No. 2503

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

PART ONE

Comprising

STATEMENT OF THE CASE,
ASSIGNMENT OF ERRORS,
REVIEW OF THE EVIDENCE.

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Filed this.....day of November, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

This action was brought in the Circuit Court of the United States, Ninth Circuit, Northern District of California, in June, 1910, by the United States against A. B. Hammond, as sole defendant, a citizen of the State of California and resident of the Northern District thereof, to recover as damages the sum of $211,854.10, alleged in the complaint to be the value of 21,185,410

feet of lumber at the rate of $10.00 per thousand feet, manufactured from timber cut upon the public lands of the United States in Montana. As standing timber its value is alleged to be $1.00 per thousand feet, or $21,-185.41, and after being felled and prepared for sawing into lumber, at the rate of $5.00 per thousand feet, or $105,927.05.

As will hereafter appear, the United States prevailed in the action and the cause is now before this Court by writ of error sued out by A. B. Hammond, the defendant in the lower Court. Hereafter for the sake of convenience we shall designate A. B. Hammond as defendant, and the United States as plaintiff.

Two separate bodies of land are involved, one lying upon the water shed of the Big Blackfoot River (these being located in Townships 13 and 14 North, Range 14 West and Township 14 North, Range 15 West and Township 14 North, Range 16 West, all of the Montana Meridian)—the other lying upon the water shed of the Hell Gate River (these being situated in Township 11 North, Range 15 West and Township 11 North, Range 16 West, Montana Meridian). Between the two bodies of land arise great mountains. The nearest point between the two cannot well be less than fifteen miles apart in an air line. The timber cut on the Blackfoot which is charged against defendant was driven down the Blackfoot River and manufactured into lumber at Bonner, which is situated just above the confluence of the Blackfoot with the Hell Gate River, some eleven miles east of the town of Missoula. This mill was operated in turn by Henry Hammond, also known as W. H.

Hammond, a brother of the defendant, first under his personal ownership and later as lessee of Blackfoot Milling & Manufacturing Company and still later was owned and operated by Big Blackfoot Milling Company. The timber cut on the Hell Gate which is charged against defendant was hauled by team or sled to a mill situated at Bonita on the Hell Gate River, some fourteen miles above the confluence of the Blackfoot and Hell Gate Rivers and twenty-five miles from the town of Missoula. This mill was originally owned by Montana Improvement Company, Ltd.; by that company installed for, and owned and operated for a few months by Fred Hammond, a brother of defendant, and finally by George W. Fenwick, a brother-in-law of defendant.

It is alleged that this appropriation of plaintiff's property occurred between January 1, 1885, and January 1, 1895, a period anterior to the bringing of the action of from fifteen to twenty-five years; but other particulars concerning the time or place or the amount claimed to have been taken from the several subdivisions of land are not given in the complaint. Furthermore it is alleged in the complaint that in the commission of this conversion defendant did not do so individually, but "as the general manager of and directing all of the business of" two certain corporations, now dead, respectively known as "The Montana Improvement Company, Ltd.," and "The Blackfoot Milling and Manufacturing Company": also that it was in pursuance of a plan between these corporations and defendant. Here it may be added that on the calling of the cause for trial the complaint

was amended so as to add yet two other corporations as whose general manager defendant, it was alleged, had committed the conversion, namely, "Missoula Mercantile Company" and "Big Blackfoot Milling Company" (Tr. p. 61).

To the complaint an amended demurrer (Tr. p. 17) was interposed which was overruled (Tr. p. 28) and that ruling is assigned as error (A. of E. No. 1; Tr. p. 794) and is here for review.

The complaint being unverified issue was joined by an amended answer (Tr. p. 41) containing a general denial (Tr. p. 42). The answer also set up a number of special defenses. As to the Hell Gate Lands it is averred that they were "mineral lands" and not subject to entry under the then existing laws of the United States, except for mineral entry and that any timber cut therefrom was lawfully taken in pursuance of the Act of June 3, 1878, 20 Stat. at large, p. 88, Chap. 150, and in compliance with the lawful rules and regulations prescribed from time to time by the Secretary of the Interior (Ans. par. 1, Tr. p. 42). Furthermore, it was averred (Ans. par. 2, Tr. p. 43) that said Hell Gate lands constituted "mineral lands not subject to entry under existing laws of the United States, except for mineral entry" as such term was then understood and construed by the Secretary of the Interior and the Federal Courts and that any timber cut therefrom was taken in pursuance of said Act of June 3, 1878, and defendant further pleaded the provisions of Section 8 of the Act of March 3, 1891, Chap. 561, 26 Stats. at large, p. 1099, and the Act of March 3, 1891, Chap. 559,

26 Stats. at large, p. 1093, as a defense. The two acts of March 3, 1891, last mentioned are also pleaded as a defense to timber cut from the Blackfoot as well as the Hell Gate (unassociated with the Act of June 3, 1878) by paragraph 5 of the answer (Tr. p. 53).

The Hell Gate and Blackfoot countries were very different as regards the status of the United States as proprietor. The Hell Gate with but a trifling exception constituted unsurveyed public lands during the period mentioned in the complaint, but not so with the Blackfoot. Hence as to the latter territory the controversy largely resolved itself into the question as to whether or not timber had been cut, for the cutting of which defendant was responsible, from the respective tracts of land, prior or subsequent to the acquisition by settlers and purchasers of such lands, it being conceded by the Government that after the date of settlement and filing the application to enter or purchase same under the public land laws of the United States, it had no property right in the timber growing thereon. So, virtually, each quarter section of the Blackfoot resolved itself into a separate controversy and by stipulation (Tr. p. 743) the date prior to which, as to each quarter section, the Government must prove the cutting to have taken place, was established.

There were two specific tracts of land in the Blackfoot territory, the defense as to which rested on a different basis, namely, Lots Numbers 9 and 10 in the South half of Section 18-14-15, containing respectively 45.32 and 45.43 acres, from which the Government claimed 161,340 feet and 193,390 feet had been converted. Paragraph 3

of the answer sets forth (Tr. p. 45) the defense in relation thereto, from which it appears that "Lot No. 9 was logged by Big Blackfoot Milling Company under a permit issued to the Company by the Secretary of the Interior under the said Act of Congress, approved March 3, 1891, entitled 'An Act to Amend Section 8 of an Act Approved March 3, 1891, entitled "An Act to repeal timber culture laws and for other purposes,"' " and that Lot Number 10 was in part logged by said Company under the mistaken belief that it was included within said permit.

The other tract which furnished a legal defense peculiar to itself was the "Edgar Claim"—Answer par. 4 (Tr. p. 49), embracing 160 acres, from which the Government claimed 1,315,000 feet had been taken some thirty years ago—Edgar, as claimed by the defendant, having in large part cut same in clearing off his claim for settlement purposes and finally being forced to abandon it because his citizenship papers were destroyed by fire (Tr. pp. 415-416). See letter from General Land Office (Tr. p. 446).

Common alike to the Blackfoot and Hell Gate tracts of land was the consideration that each lay within the forty-mile limit of the Northern Pacific Railroad grant which conferred upon the railroad the ownership of the odd numbered sections and in Hell Gate Valley, more particularly, large quantities of timber had at an earlier date been lawfully cut from the lands involved in this action for the construction of said railroad which ran through the Hell Gate Valley.

With the issues thus joined trial before a jury commenced on January 14, 1913. During the course of the trial and after defendant had at great expense prepared his defense by the taking of depositions relative thereto, plaintiff eliminated certain specified tracts of land in the Blackfoot from which it was alleged defendant had converted timber. The lands so eliminated were as follows:

1. In Section 22-14-14 land known as the Sontag, and two Silvey claims, amounting in all to 400 acres, leaving in said section 80 acres, constituting the East half of the North East quarter thereof, which for convenience will hereafter be designated as the "Boyd Trespass" (Tr. p. 71).

2. The Smith Davis claim of 160 acres, constituting the South East quarter of Section 8-14-14 (Tr. p. 81).

3. The North West quarter of Section 2-14-14, constituting 160 acres, as to which it was admitted no timber had ever been cut thereon (Tr. p. 81). Thus of the 2080 acres charged against defendant plaintiff abandoned 680 acres, or 30% of its claim. While the amount charged in the complaint was 21,185,410 feet, plaintiff admitted (Tr. p. 746) that after the introduction of all the evidence in the case and making allowance for eliminations noted its claim against defendant was 16,000,000 feet. The testimony of the Government estimators attributed approximately one-half of the timber cut to the Hell Gate and the other half to the Blackfoot.

The complaint did not pray for the recovery of interest, but upon the close of all the testimony, over the

objection of defendant (Exception No. 39, Tr. p. 746) plaintiff was permitted to amend its complaint by adding to the last line of the prayer the words "and for interest thereon", which ruling is assigned as error (A. of E. 39, Tr. p. 831) and as to the substantive law involved therein will be considered in conjunction with instructions on the subject which the Court gave the jury.

The trial lasted from January 14 until February 8, 1913—there being fifteen trial days—when the jury returned a verdict against defendant in the sum of $51,040.00. Costs were thereafter taxed at the sum of $1617.49. It is here urged, supported by bill of exceptions to the order taxing costs (Tr. p. 788) and assigned as error (A. of E. 58; Tr. p. 834) that the amount at which the costs were taxed is excessive in the sum of $108.30 through the adoption of an erroneous method in the computation of the mileage of witnesses coming from without the district.

Over the objection and exception of defendant (Tr. pp. 770, 776, 780), which is here assigned as error (A. of E. 10, Tr. p. 809), the Court instructed the jury that in fixing the amount of any verdict interest should be included on the value of any lumber so converted from the date of such conversion to the present time. The Court also, over the objection and exception of defendant, instructed the jury what constituted the measure of damages from the respective view points of innocent and willful trespass (Tr. pp. 769-70; p. 780), which instructions are here assigned as error (A. of E. 8 and 9, Tr. pp. 806-9).

The jury returned a verdict in the lump sum of $51,040.00.

It was obviously arrived at by the following method of calculation:

They placed the stumpage value at $1.00 per thousand feet.

16,000,000 feet at $1.00 per thousand	$16,000.00
They took $1.00 per thousand feet as profit	16,000.00
They allowed interest from 1895 to 1912—17 years at 7%—equal to 119% on the stumpage value	19,040.00
Making a total of	$51,040.00

In due time defendant moved for a new trial and among other things contended that there was no liability whatever on the part of defendant and that if this were not so, then the only proper measure of damages under the circumstances of the case was the stumpage value in the tree, which did not exceed $1.00 per thousand feet and that it was error to have directed the jury to award interest. Defendant suggested that if on other grounds the motion for a new trial was not granted that it at least should be conditionally granted, that is to say, in effect that the Court should order a new trial unless plaintiff within a reasonable time consented to the modification of the judgment entered upon the verdict from $51,040 to $16,000.

The learned trial Court denied the motion for a new trial and in so doing handed down an opinion on Sep-

tember 25, 1914, which is made an appendix to this brief, as it has not been published in the Federal Reporter.

As will be seen, the burden of the opinion is to the effect that the defendant's exceptions to these instructions were not sufficiently specific and that the Court was not informed of the several aspects in which it could be claimed, or, in fact, was claimed, that the instructions were erroneous.

As to the instructions concerning the measure of damages the trial Court said:

> "If we may regard the exception as sufficent in substance to enable the Court to consider the objections urged upon their merits I think it will be found that the charge in the respect involved is fully in harmony with approved principles applicable to cases of this character."

As a practical matter, therefore, it would seem that said charge would have been given regardless of the form of plaintiff's exception. The trial Court, therefore, cannot be said to have been led into error because of any misconception of defendant's exception to the law as laid down in the instruction.

The instruction directing the jury to award interest, was clearly erroneous as we shall hereafter demonstrate. Nevertheless the learned trial Court considered the ruling contained in this instruction as "the generally prevailing one".

We know, however, that the jury awarded interest in the sum of $19,040.00, and if this was error, the precise effect of that error is demonstrable in dollars and cents.

Why should that error not be corrected? Why at least should not the judgment be reduced by that sum?

The appellate Courts of the United States have been careful to place the honor of the Government upon a high standard. They have not permitted the Government to take advantage of the mere errors or technical oversights of its citizens in order to enrich itself at the unjust expense of the citizen. Thus, in a recent case the Circuit Court of Appeals for the Fifth Circuit, in a timber trespass case, struck an item of interest from a judgment although no exception had been taken and no error assigned.

White v. United States, 202 Fed. 501; 121 C. C. A., 33.

On this hearing the main questions to be considered by the Court relate to the said instructions concerning the measure of damages and interest and those features in the case which we contend required the Court to instruct the jury to find a verdict for defendant, which the Court failed to do (Defendant's Proposed Instruction No. 6, Tr. p. 749; A. of E. 13, Tr. pp. 810-811).

Prominent in this connection will be the consideration as to whether or not there was any proof sufficient to connect defendant with any conversions which may have been established. In this behalf also the failure of the Court to give to the jury defendant's proposed instructions which more clearly define the circumstances under which one not personally and physically committing a

conversion might nevertheless be held liable therefor will be considered, as we maintain in this respect the jury was not sufficently instructed (Defendant's Proposed Instructions 3, 4, 5, 7, 10, 11, 12, 13 and 14, Tr. pp. 747 et seq.; A. of E. 14, 15, 16, 17, 19, 20, 21, 22, 23, Tr. 811).

The Court instructed the jury over the objection of defendant (Tr. pp. 779-80) that if the manner of the taking of the timber was such as to enhance plaintiff's difficulty in establishing the exact extent of the damage, the proof need not be of that precise exactitude which would be required under other circumstances. This was assigned as error (A. of E. 7; Tr. pp. 804-805) as is also (A. of E. 18, Tr. p. 814) the failure of the Court to give defendant's proposed instruction concerning the burden of proof which, of course, also bears on the subject last mentioned (Defendant's Instruction 9, Tr. p. 749).

An instruction concerning the Mineral Land Act of June 3, 1878, excepted to by defendant (Tr. p. 777), which is assigned as error (A. of E. 4, Tr. p. 795) as well as an instruction peculiar to the Edgar Claim and excepted to by defendant (Tr. p. 779, A. of E. 5, Tr. p. 880), will also be reviewed.

Other errors hereafter to be considered have been already noted in this statement of the case and in addition we claim there was prejudicial error committed in the rejection and admission of certain testimony and evidence (A. of E. 24-49 inc. and 51 to 57 inc., Tr. pp. 818 et seq.).

We think all the questions to be discussed will be more readily understood and a general view of the case before this Court best obtained if for our first point we take up the lack of evidence to connect the defendant with any conversion which may have been established by the proof.

Specification of Errors.

1. The Court erred in overruling the demurrer of defendant to the complaint herein.

2. The reading to the jury after it had retired to deliberate upon its verdict, of the direct testimony, or part of the direct testimony, of a witness called on behalf of the plaintiff, namely, Thomas G. Hathaway, and at the same time denying to the defendant the right to read to the jury at said time testimony given by said witness on cross-examination, which testimony last mentioned contradicted in many important particulars the testimony given by said witness on direct examination, and which said testimony last mentioned was so reread to the jury, upon the ground that thereby an irregularity was committed in the proceedings of the Court and jury, and an abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial, and in overruling defendant's objection thereto (Exception No. 40).

3. The failure of the jury to state how much, if any, of the verdict of fifty-one thousand and forty dollars ($51,040) brought in by it against defendant, was composed of interest, the Court having instructed the jury

that in fixing the amount of any verdict it might find for the plaintiff, the jury should include interest at the rate of seven per cent (7%) per annum on the value of any lumber converted from the date of such conversion to the present time, which defendant specifies as misconduct of the jury.

4. The Court erred in instructing the jury as follows:

"The defendant pleads in justification of the cutting and conversion of part of the timber in question the right so to do under the act of June 3d, 1878. That act authorizes citizens of the United States and other persons, *bona fide* residents of certain states and territories, to cut for building, agricultural, mining or other domestic purposes, any timber or trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in the state or territory of which the parties cutting are residents.

"The word 'residents' as herein used includes domestic corporations, that is, corporations organized and existing by virtue of the laws of the State or territory wherein they are cutting and removing timber from the public domain.

"This authority is given subject to regulations authorized to be made by the Secretary of the Interior, for the protection of the remaining timber and undergrowth. Pursuant to the authority thus conferred, the Secretary of the Interior, on August 5, 1886, prescribed, among others, the following regulation:

" 'Every owner or manager of a sawmill, or other person felling or removing timber under the provisions of this Act shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions, if surveyed, and as near as practicable

if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining or other domestic purposes within the State or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchased such timber or lumber exclusively for his own use and for the purposes aforesaid. (5) The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department. (6) Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or territory where it grew.'

"The regulation just quoted is a lawful and reasonable one and imposes upon a person or corporation engaged, after its promulgation, in conducting a sawmill, or engaged to a considerable extent in such cutting, or who makes a business of cutting timber on mineral lands and selling it to keep the record prescribed above; and without the observance of which such cutting cannot legally be done. In this case defendant has offered no evidence tending to show a compliance with these regulations, and I accordingly instruct you that for that reason defendant has failed to bring himself within the protection of the Statute of 1878, and is not relieved of liability for any timber so cut since that regulation was adopted by reason of the fact that said lands may have been in fact mineral in character. You may, however, as indicated by the ruling of the Court during the trial, consider the evidence offered by

defendant and admitted, touching the character of the land along the Hellgate, as bearing upon the question of the good faith of those taking timber on those lands in the asserted belief that they were entitled so to do by reason of the lands being mineral in character, solely for the purpose of determining the measure of damages for such taking in the event you find the defendant responsible therefor.

"In this connection and as bearing on the question of such good faith, you will understand that the phrase 'said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry,' as used in the Act of June 3d, 1878, does not mean that a person is entitled to cut from the public domain merely because of the fact that there may be some known mineral lands within the vicinity of the lands from which timber is cut. Nor does the term mineral lands as here used include all lands in which minerals may be found, but only those lands where the mineral exists in sufficient quantity to pay for its extraction and known to be such at the time and to the persons cutting. If the land in question is worth more for agricultural purposes than mining it is not mineral land within the meaning of the Act, although it may contain some measure of gold or silver or other valuable minerals. This is also true of timber lands. If the lands along the Hellgate River from which a portion of the timber in question was cut were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and neither the defendant nor the corporations named had a right to cut timber from such lands under the Act of June 3d, 1878. These things anyone taking timber from such lands is presumed to know, and if timber is taken without actually ascertaining the character of the land, it is taken at the peril of being held responsible therefor."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the rules and regulations of the Secretary of the Interior, referred to therein, were, or that any of them was, lawful or reasonable.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it in effect instructed the jury that such rules applied to one operating under appointment or agency for another person, as was George W. Fenwick.

To which portion of said instruction defendant duly excepted.

(c) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that defendant had offered no evidence tending to show a compliance with said Rules and Regulations, and instructing the jury that for that reason defendant had failed to bring himself within the protection of the said Statute of 1878, and that defendant was not relieved of liability for any timber so cut since said Regulation was adopted, by reason of the fact that said lands might have been in fact mineral in character.

To which portion of said instruction defendant duly excepted.

(d) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it

instructed the jury as to the meaning of the words, "Mineral Lands", as used in the Act of June 3d, 1878, and particularly in that portion of the instruction wherein it stated that if the lands along the Hellgate River, from which a portion of the timber in question was cut, were more valuable for the timber standing and growing thereon than for the minerals contained therein, then such lands were not mineral in character and not subject to entry under the then existing mineral laws of the United States, and that neither defendant nor corporations named had a right to cut timber from such lands under the Act of June 3d, 1878.

To which portion of said instruction defendant duly excepted.

5. The Court erred in instructing the jury as follows:

> "The defendant seeks also to justify the cutting and removing of the timber from the S. E. ¼ of Section 28, Township 14 North, Range 14 West, by reason of the fact that the same was embraced within the Homestead Entry of one Henry F. Edgar —commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him,

acting under his direction and control, cut and converted the timber in question from the S. E. ¼ of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements, is in law a willful trespasser, without regard to the question of his good faith in making the entry.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that if defendant was liable for all or any part of the timber cut and removed from the so-called Edgar Claim, then that he was liable for the full value of the timber so cut and carried away at the time it was sold, in that thereby the Court took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

6. The Court erred in instructing the jury as follows:

"The defendant further sets up in his answer that the cutting and removing of the timber from the N. ½ of the S. W. ¼ of Section 18, Township 14 North, Range 15 West, was authorized by a permit issued by the Secretary of the Interior on January 16, 1892, to the Blackfoot Milling & Manufacturing Company under and by virtue of the provisions of the Act of March 3, 1891, which permit was afterwards transferred to the Big Blackfoot Milling Company. The permit so issued was made subject to certain conditions, restrictions and limitations therein set forth and which have been read to you. The Act provides that the Secretary of the Interior may designate the sections or tracts of land and prescribe the conditions, limitations and restrictions under which the cutting shall be carried on. In this instance, as stated, the Secretary of the Interior did prescribe the conditions, restrictions and limitations under which said corporations could cut timber from the lands last above described by inserting them in the permit itself. These conditions, restrictions and limitations were reasonable, and it was the duty of those acting under such permit to comply therewith. If you find that the said corporations named, acting under and through the direction and control of the defendant, cut and removed the timber from the lands last described without complying with the conditions, restrictions and limitations embodied in said permit, then neither they nor the defendant acquired any right whatsoever in and to the timber so cut and removed, but such cutting was a trespass and the plaintiff is entitled to recover for the value of such timber if converted as alleged. Moreover, it was the duty of those cutting under said permit to know and ascertain the lines bounding the land from which they were entitled to cut timber thereunder, and the fact that they may have misapprehended their rights under such permit will not justify a cutting outside such lines, nor will it mitigate the damages resulting

therefrom. In other words, although the jury may find that defendant or those under his direction cut outside of the lands included in such permit under the mistaken belief that the permit included the lands from which they did cut, they would in law, as to the lands outside of this permit, be trespassers and liable to the plaintiff for the value of any timber so cut."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the burden of proof rested upon the defendant to establish that the cutting and removal of the timber had been done in accordance with the conditions, restrictions and limitations contained in the permit mentioned in said instruction.

To which portion of said instruction defendant duly excepted.

(b) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the fact that those cutting under the permit, referred to in said instruction, may have misapprehended their rights thereunder would not mitigate damages resulting therefrom, and that they would be liable for the value of any timber so cut. The Court thereby took away from the jury the question whether or not the stumpage value of the timber so cut and removed might not be the measure of defendant's liability in damages.

To which portion of said instruction defendant duly excepted.

7. The Court erred in instructing the jury as follows:

> "But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he has made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff can not recover beyond nominal damages."

To which said instruction defendant duly excepted.

(a) The Court erred in that portion of the instruction, last hereinabove quoted and set forth, wherein it instructed the jury that the manner of the taking of the timber by defendant might have been such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, and that in such a case a less degree of certainty in establishing the extent of plaintiff's damage is required than otherwise.

To which portion of said instruction defendant duly excepted; and defendant assigns the giving of such portion of said instruction as error as an abstract proposition of law, and furthermore, in any event inapplicable to the evidence, there being no evidence whatsoever that the manner of the taking of the timber was such as to enhance the difficulty of the plaintiff in establishing the exact extent of the wrong committed upon it, and, therefore, to permit a recovery of damages on proof less certain as to the extent of such damages than would otherwise be required.

8. The Court erred in instructing the jury as follows:

> "It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of $211,854.10. But should you find that plaintiff is entitled to recover you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate, and that is always subject to control by the evidence in the case.
>
> "If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale."

To the giving of which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law, in this, that thereby the jury was instructed that it might allow damages against defendant, if in fact any damages were found by it to be recoverable, computed at the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale, even though he did not know that the corporations named, acting under his direction and control, had knowingly and willfully cut and converted the timber mentioned in the complaint, or any part thereof, and even though defendant did not know anything whatsoever about such cutting and conversion; and, further, that said instruction was erroneous as inapplicable to the evidence in the cause, there being no evidence whatsoever to show that defendant knew, or should have known, or had knowledge or notice, of the facts, or any of them, concerning the alleged cutting and conversion; and that there was no evidence whatsoever to justify the finding that defendant, in the conversions complained of, acted willfully, maliciously, or was conscious of any wrong-doing on his part, and that thereunder defendant should not be held liable for damages based upon a higher value of the timber converted than its stumpage value, to wit, the sum of one dollar ($1.00) per thousand feet.

9. The Court erred in instructing the jury as follows:

> "If you find that the defendant, or any of said corporations while acting under his direction and control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mis-

taken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market."

To which said instruction defendant duly excepted; and defendant avers that said instruction was erroneous as an abstract proposition of law and inapplicable to the case, inasmuch as under the pleadings the plaintiff alleged that the value of the timber alleged to have been converted while in place in the stump, did not exceed one dollar ($1.00) per thousand feet, and that plaintiff was thereby limited to such value as the basis for computing the value of the timber taken on the theory of an innocent trespass, and was, furthermore, inapplicable to the case, inasmuch as there was no evidence whatsoever as to what was the cost of manufacturing the timber into lumber, or what was the value added to said timber by reason of manufacturing the same into lumber, and that, therefore, there was no basis from which the jury could determine, under the instructions of the Court, any other value of the timber converted than that based upon the value of the tree in place, namely, not to exceed one dollar ($1.00) per thousand feet, board measure.

10. The Court erred in instructing the jury as follows:

> "In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time."

To which said instruction defendant duly excepted; and defendant avers that the giving of said instruction was erroneous, in that, so long a period of time had elapsed between the commission of the act or acts of conversion complained of and the bringing of said action, there being no adequate, or any, explanation, justification, or excuse for such delay; and, further, in that the Court failed to instruct the jury that its finding of the amount of interest, if any, should be separate and segregated from its finding as to damages, if any, exclusive of interest.

11. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars ($16,000.00).

12. That the Court erred in giving any charge to the jury which would permit of a recovery against defendant in excess of the sum of sixteen thousand dollars ($16,000.00), with interest thereon at the rate of seven per cent (7%) per annum from the time, or times, of the conversion, or conversions, until the close of the trial of said action.

13. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "I instruct you that the evidence offered in this case is not sufficient to justify the rendition of a verdict against the defendant in this action, and therefore I direct you that you return a verdict in favor of the defendant."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VI.) And defendant specifies as several and separate grounds wherein the Court erred in failing and refusing to give said proposed instruction last mentioned, the following:

(a) That there is no evidence whatsoever to justify a finding that any act of conversion was ever committed by any one.

(b) That there is no evidence to justify a finding that defendant is liable for any conversion that may have been established by the evidence.

(c) That there is no evidence to justify a finding that defendant personally directed, or participated in, the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(d) That there is no evidence to justify a finding that defendant entered into a plan or conspiracy, or conspired, with any one to commit or cause to be committed the acts of conversion, or any of them, alleged in the complaint herein, or that may have been proved upon the trial.

(e) That there is no evidence to justify a finding that defendant aided or abetted in the commission of the acts of conversion, or any of them, which the jury may have found to have been committed.

(f) For that the uncontradicted evidence established that all of the timber alleged in the complaint, or proved upon the trial, as being cut down, felled, and removed, and manufactured into lumber and appropriated, used, sold and converted by defendant, or by any joint tort-feasor of defendant, or anyone for whose acts defendant is responsible, was cut and removed from the public timber lands of the United States by persons then citizens and residents of the State or Territory of Montana, for agricultural, mining, manufacturing or domestic purposes, and was actually used for such purposes and not transported out of the said State or Territory of Montana, and that at the time mentioned in the complaint herein, there were no regulations made or prescribed by the Secretary of the Interior respecting said matter.

14. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "In order to maintain this action, the plaintiff must prove that the timber in question was its property, and that while it was the property of the plaintiff it came into the possession of the defendant who converted it. If you find that the defendant never came into possession of the timber, and never purported to assume or assumed control over it, then your verdict must be for the defendant."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction III.)

15. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"I instruct you that, even if you find that timber was converted, and that the proceeds derived from the sale of the same were paid over to the Missoula Mercantile Company in payment of debt, that this circumstance would not of itself render either the Missoula Mercantile Company, or any of its officers or stockholders, liable. Before the defendant Hammond can be held liable for conversion of such timber, he must have personally planned or have personally directed the cutting of the particular timber converted, or he must have dealt personally, or through agents personally directed by him, with the possession or disposition of such timber after it was cut."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IV.)

16. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

"If you find that any of the timber, for the conversion of which this action is brought, belong to the United States, and was converted by Henry Hammond, G. W. Fenwick, or Fred Hammond, the Montana Improvement Company, the Blackfoot Milling and Manufacturing Company, or the Big Blackfoot Milling Company, and that, pursuant to the instructions of said persons or corporations, or either of them the purchase price which was received for such timber so converted was paid to any corporation in which the defendant was a stockholder or officer, yet, as matter of law, I instruct you that this does not entitle the plaintiff to maintain this action against the defendant, nor does this constitute a conversion by defendant of the plaintiff's property."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction V.)

17. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "I instruct you that conversion consists in an act of willful interference with any chattel without lawful justification, whereby the person entitled thereto is deprived of possession of it. The chattels for the conversion of which this action is brought consist of timber or lumber claimed to be owned by the United States, and if you find that the United States did own this timber, or lumber, yet, as matter of law, if the defendant in this case did not interfere with the possession of the United States in or to the timber or lumber, for the conversion of which this action is brought, then your verdict must be for the defendant."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction VII.)

18. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "The burden of proof is on the plaintiff not only to establish by a preponderance of the evidence that timber has been unlawfully taken from the lands involved in this controversy, or from some portion thereof, but it is also incumbent upon the plaintiff to show, by a preponderance of the evidence, by whom the same was taken, and the quantity thereof, and I instruct you that, even if you should be satisfied from the evidence that timber had been unlawfully converted, and that the defendant was responsible therefor, nevertheless, if, from the evidence, you are unable to ascertain the quantity or extent of the timber taken, your verdict must be for the defendant, and, in this same connection, I instruct you that you are not permitted to guess at the quantity taken or to speculate as to the amount. You must, in such case, find a basis, in the preponderance of the evidence, for your computation in computing the amount of timber taken."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction IX.)

19. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "A. B. Hammond appears to have been a director of the Big Blackfoot Milling Company, and a stockholder therein. It is admitted by the defendant here that one Boyd, while employed by the corporation, entered upon a certain eighty acres of land in section 22, township 14 north, range 14 west. Now, although this act may have been innocent, the corporation which employed Boyd would be responsible for the taking, even though it had given Boyd express directions to be careful and to keep within the lines of the property upon which the corporation had a right to cut, and even though it was entirely ignorant that Boyd had gone beyond those lines on to property of the Government. But the question for you to decide is not whether the corporation would be responsible, but would A. B. Hammond be responsible, and, in such connection, I instruct you that A. B. Hammond would not be responsible unless he had personally participated in directing Boyd to cut this particular timber, or unless, after the timber was cut, he had personally participated in its possession, sale, or disposition. Even a knowledge upon A. B. Hammond's part that Boyd was an employee of the corporation and was cutting timber for the corporation would not of itself be sufficient to justify a verdict against the defendant. Before the defendant can be held liable for Boyd's cutting, the defendant must in some manner have actually participated in the unlawful act of Boyd."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction X.)

20. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "If you believe from the evidence that Henry Hammond, during the period while the Edgar Claim was cut, was the sole owner of the Bonner Mill, and that the defendant did not participate in the cutting of the timber from said claim, or in the manufacture of it into lumber, or in the sale or disposition thereof, then I instruct you that the defendant would not be liable for the conversion of said timber."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XI.)

21. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "If you find from the evidence that timber was cut from Lot 10 in Section 18 by the Big Blackfoot Milling Company at a time when said corporation had a permit to cut over the adjoining property, and over a very large area of the public domain in addition thereto, and if you find that the said timber was cut contrary to the directions of the said corporation, by some of its employees, then I instruct you that the said corporation nevertheless would be liable for the taking thereof. But again the question arises: Would the defendant, A. B. Hammond, a director and stockholder in the said corporation, be personally liable? The answer is that he would not be liable unless you find from the evidence that he personally participated in the taking of the said timber. If he knew nothing of the taking thereof, and took no personal part therein, he would not be liable, although the corporation in which he was a stockholder and director would be liable."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XII.)

22. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "Before you can hold the defendant liable for the conversion of any timber that may have been taken from public lands and sawed at the Bonita Mill from the Hellgate country, it will be necessary for you to find either that A. B. Hammond was a principal or an agent in the acts of trespass from which the conversion has resulted. If you find that A. B. Hammond at no time had any interest, either direct or indirect, in the Bonita Mill while the same was operated by Fred A. Hammond or George W. Fenwick, and that he did not in any manner participate in the cutting of the timber, or in the manufacture and sale thereof, then I charge you that A. B. Hammond is not legally liable for the taking thereof."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIII.)

23. The Court erred in failing and refusing to instruct the jury as requested by defendant as follows:

> "If you find from the evidence that the Montana Improvement Company erected the Bonita Mill and sold the same to Fred A. Hammond, and that Fred A. Hammond in turn sold the same to George W. Fenwick, and that from and after the time of the said sale neither the Montana Improvement Company nor the defendant, A. B. Hammond, had any interest whatsoever in the said mill, then I charge you that the said Montana Improvement Company would not be liable unless it were shown by a preponderance of the evidence that prior to the sale to Fred A. Hammond it had cut logs upon some portion of

the land involved in this action. Whether or not there is any evidence in the record to the effect that the Montana Improvement Company ever cut any logs, is a question for the jury. But even if the Montana Improvement Company should be found by you so to have cut timber, then the defendant would not be liable for such cutting merely because he was the owner of a portion of the stock of the Montana Improvement Company, or was an officer thereof. As already said to you, in the case of a corporation a stockholder or officer is not personally liable in conversion merely because he is a stockholder or officer. He is liable only in case he has himself personally participated in the conversion, and then he is held liable in law not because of the fact that he is a stockholder or officer; that fact has nothing to do with the question. He is liable in such case because of his personal participation in the conversion."

To the failure and refusal of the Court to give said instruction, defendant duly excepted. (Defendant's Proposed Instruction XIV.)

24. The Court erred in permitting the witness William Greene to answer the question as follows: "From your experience as a scaler of timber, can you judge from what you observed on section 18 there, which portion of the section had been cut first?" by saying: "On the southeast quarter of these lots." And in overruling defendant's objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-A.)

25. The Court erred in permitting the witness William Greene to answer the question as follows: "From your experience, can you tell the time that had elapsed between the first cutting and the second cutting?" by

saying: "Well, in my judgment, it would be somewhere about five or six years." And in overruling defendant's objection thereto upon the ground that it was incompetent, irrelevant and immaterial. (Exception No. 1-B.)

26. The Court erred in denying defendant's motion to strike out the testimony of the witness William Greene and conclusions made by him concerning the amount of timber testified to by the witness as having been cut and taken from lands described in the complaint; upon the ground that such testimony and conclusions were hearsay, irrelevant, incompetent and immaterial, and to which ruling of the Court defendant duly excepted. (Exception No. 1-C.)

27. The Court erred in permitting the witness, John M. Keith, to answer the question as follows: "And is it not also true that if the Missoula Mercantile Company had not carried Mr. Greenough he could not have carried on those operations?" by saying: "I think that is true of many of them in those days; there were very few persons then who had any amount of means"; and in overruling defendant's objection thereto, upon the ground that it was incompetent, irrelevant and immaterial and not cross-examination. (Exception No. 2.)

28. The Court erred in overruling the question propounded by defendant to the witness, William H. Hammond, as follows: "At the time that you made this purchase, was it an out and out straight business transaction, whereby it was intended that the title, both legal and equitable, should pass to you, or was it intended and agreed among you that you should take title and

hold it for some other concern, person or corporation?'' defendant thereby intending to elicit, and would have elicited, from the said witness an answer to the effect that said transaction was an out and out straight business transaction and that it was intended that he should take the title, both legal and equitable, for his own use and benefit, and in sustaining plaintiff's objection to said question, upon the ground that it was leading and suggestive, and upon the further ground that the instrument speaks for itself as to what it is. (Exception No. 3.)

29. The Court erred in refusing to permit the document bearing date February 10, 1888, purporting to be a lease between the Blackfoot Milling and Manufacturing Company, as lessor, and William H. Hammond, as lessee, to be offered in evidence, defendant offering said document as the document under which the said William H. Hammond took possession of the leased premises, and in sustaining plaintiff's objection thereto for the reason that the document does not bear on its face any authority from the Blackfoot Milling and Manufacturing Company for its execution; that it is merely signed by the president; that it is not acknowledged before a notary public and that it is an instrument affecting the right of possession to real property for more than one year; that there is nothing to show that it is the instrument that it purports on its face to be; in other words, the instrument purporting to be executed by the Blackfoot Milling and Manufacturing Company does not bear the seal of that company. (Exception No. 4.)

30. The Court erred in refusing to allow the witness, William H. Hammond, to answer the following question: "I now ask you to state from your recollection, what the terms of the instrument were that you had a duplicate of, that purported to be a lease?" defendant arguing that it was the document under which the said William H. Hammond took possession of the Bonner Mill, and further contending that it went to the question of his good faith in everything he did, and in sustaining the objection of plaintiff to the question, for the reason that the instrument itself would be the best evidence of its terms. (Exception No. 5.)

31. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question as follows: "While you were operating the property under that lease that you have testified to, state how much rental you paid," for the purpose of showing the *bona fides* of the transaction, and in sustaining the objection of the plaintiff to said question, on the ground that the lease itself should be the best evidence of the amount of rental that was to be paid. (Exception No. 6.)

32. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "To whom did you pay rental?" which, had the witness been permitted to answer same, he would have stated that he paid rental therefor to the lessor, Blackfoot Milling and Manufacturing Company, thereby tending to establish the *bona fides* of the transaction under which he became and continued to be lessee of said property, and in sustaining the objection of plaintiff to said ques-

tion on the ground that the lease itself should be the evidence of the person to whom the rental was paid. (Exception No. 7.)

33. The Court erred in refusing to permit the witness, William H. Hammond, to answer the following question: "Was there any provision of any kind for the extension of the original lease which you have mentioned?" defendant thereby intending to show, and the said witness would have stated, that there was such provision and that such provision was inserted as part of the consideration moving to him for his transfer to the said Blackfoot Milling and Manufacturing Company of the said property which he had theretofore owned in severalty and absolutely, and thereby evidence would have been furnished tending to establish the original *bona fide,* absolute and several ownership of the said witness of said property and of the *bona fide* character of the transfer by him of said property to said Blackfoot Milling and Manufacturing Company and of the lease that was made to him by said company, and in sustaining the objection interposed by plaintiff to said question, on the ground that it called for the giving of the provisions of the lease. (Exception No. 8.)

34. The Court erred in refusing to permit the witness William H. Hammond, to answer the question propounded to him by defendant as follows: "Mr. Hammond, state whether or not while engaged in the logging business in the State of Washington you obtained credit from any mercantile concern?" defendant thereby intending to, and would have, elicited from the witness an answer to the effect that he had obtained such credit,

and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 12.)

35. The Court erred in refusing to permit the witness, William H. Hammond, to answer the question propounded to him by defendant as follows: "State whether or not while in business in Washington it was your custom to give orders upon any mercantile house in payment of your men," by which question it was intended to elicit the fact that it was, and that, therefore, there was nothing sinister in the following of the same practice at a later date, as indicating any undue or other relationship than that of debtor and creditor between defendant or the Missoula Mercantile Company, on the one hand, the said witness, on the other; and in sustaining plaintiff's objection to said question, on the ground that it was irrelevant, incompetent and immaterial as to any custom that existed in some other State at a time prior to the time in question. (Exception No. 13.)

36. The Court erred in denying the admission in evidence of those two certain affidavits, dated November 21, 1885, and purporting to have been made by H. A. Ameraux and William H. Smith, which the witness, G. W. Fenwick, identified as having been seen by him before he made his purchase of the Bonita Mill; each of the said affidavits, in substance, sets forth that affiant was familiar with the country lying along the line of the Northern Pacific Railroad between the Town of Missoula and the Town of Bearmouth, in the Territory of Mon-

tana; and that he was enabled to testify understandingly with regard thereto; that said land was mineral in character and not subject to entry under existing laws of the United States as agricultural land, and that to his certain knowledge there were many mineral locations, leads, lodes and ledges bearing gold, silver and other precious metals; and that within said limits and near said railroad there was an organized mining district, in which were a number of mines then being worked for precious metals; and that said country and lands were essentially mineral land and unfit for agricultural lands, and were not chiefly valuable for the timber thereon; defendant thereby intending to show the good faith, and basis for the good faith, of the said G. W. Fenwick in his belief that the lands upon which he cut timber were mineral lands, upon which he might rightfully cut timber under the provisions of the Act of Congress of June 3, 1878; and in sustaining the objection of the plaintiff to the admission in evidence of said affidavits, for the reason that they were, and each of them was, wholly irrelevant, incompetent and immaterial, and on the further ground that each is an *ex parte* affidavit and an attempt to introduce evidence as to the mineral character of the lands in question under conditions when the plaintiff in this case has had no opportunity to examine or cross-examine the witness testifying as to the mineral character of the land. (Exception No. 13-A.)

37. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question put to him by defendant as follows: "What acts, if any, of management of the Bonita Mill property on the Hellgate, did

Mr. A. B. Hammond exercise during the time that you have testified to, from your purchase in 1886 until the time that you gave up the mill?" defendant thereby intending to elicit from the witness, and the witness would have testified, that the said A. B. Hammond did not exercise any acts whatsoever of such management at any time; and in sustaining the objection of plaintiff to said question, on the ground that it called for the conclusion of the witness. (Exception No. 14.)

38. The Court erred in refusing to permit the witness, G. W. Fenwick, to answer the question propounded to him by defendant as follows: "State whether or not demand was ever made upon you by any officer of the federal Government for an inspection of your books or records at any time during the time that you were operating this property", by which it was intended to elicit, and the said witness would have testified, that no such demand had been made; and in sustaining the objection of plaintiff to said question, on the ground that it was irrelevant, incompetent and immaterial. (Exception No. 15.)

39. The Court erred in requiring the defendant, A. B. Hammond, as a witness, to answer the question propounded, upon cross-examination, by plaintiff to him, as follows: "How much did you ultimately realize from the sale of your interest in the Blackfoot Milling and Manufacturing Company, the Big Blackfoot Milling Company, the Montana Improvement Company and the Missoula Mercantile Company?" by saying: "Well, so far as the Montana Improvement Company is concerned, I came out at the little end of the horn. I

never got anything out of it. I lost what I put in. The Blackfoot Milling and Manufacturing Company was a transfer of stock. I received stock in the Big Blackfoot Milling Company; that was really in effect a transfer of the Blackfoot Milling and Manufacturing Company to the Big Blackfoot Milling Company, and I received stock in that transfer; and in overruling defendant's objection to said question, on the ground that it was irrelevant, incompetent and immaterial, and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 16.)

40. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question propounded to him by plaintiff, as follows: "From the Big Blackfoot Milling Company, how much did you ultimately receive out of it?" by saying: "I got my *pro rata* out of the sale of the Big Blackfoot Milling Company. I could not say off-hand what it amounted to, but I think it was as much as my brother got"; and in overruling defendant's objection to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 17.)

41. The Court erred in requiring the defendant, A. B. Hammond, as a witness upon cross-examination, to answer the question as follows: "What was the value of your stock when you transferred your interest in the Missoula Mercantile Company?" by saying: "That is a matter of opinion. It did not increase very much. I got six per cent dividends on my stock in the Missoula Mercantile Company. I took stock in another corporation"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 18.)

42. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the following question: "What is your estimate of its value (the value of the holdings of shares of stock by witness in the Missoula Mercantile Company) at the time of your disposition of it?" by saying: "I do not consider that it depreciated any. It was worth as much as it was originally worth, if not more"; and in overruling the objection of defendant to said question, on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 19.)

43. The Court erred in requiring the defendant, A. B. Hammond, as a witness, upon cross-examination, to answer the question as follows: "Can't you give it to me in dollars and cents so we can get it into the record?" by saying: "I should judge it was worth at least two hundred and fifty or three hundred thousand dollars"; and in overruling the objection of defendant to said question on the ground that it was irrelevant, incompetent and immaterial and not cross-examination, and that it was an incompetent inquiry as to the private affairs of a citizen upon cross-examination which amounts to an inquisition, as against which he is guaranteed under the federal constitution. (Exception No. 20.)

44. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: "You may state the examination you made of each section separately and what you found upon it and your conclusions as to the mineral or non-mineral character of the ground," by saying: "Starting in with section 10, township 11 north, range 16 west, as to the north half of the northwest quarter and the northwest quarter of the northeast quarter, I found that most all of those three forties were sandstone, with a little lime in the extreme northeast quarter, and there was no excavation of any nature there, absolutely nothing to indicate the land having any value for mineral purposes. The formation dipped to the southwest, and as I said, there was no excavation of any kind, nor anything to indicate the mineral character. The sandstone is not mineralized. Then take the south half of the southeast quarter of

section 10 and the northeast quarter of the southeast quarter of section 10, the same township and range, I found that the northeast quarter of the southeast quarter was entirely underlain with sandstone, and in the southeast quarter of the southeast quarter, practically the whole forty was covered with diabase. Diabase is an igneous rock, consisting of plagioclase and feldspar. It may contain minerals. That rock in this particular place did not contain minerals. In the other forty, that was underlain mostly with valley alluvium, and the formation in places does not show for that reason''; and in overruling the objection of defendant interposed to said question, upon the ground that it was irrelevant, incompetent and immaterial and not rebuttal. (Exception No. 21.)

45. The Court erred in permitting the witness, George B. Archibald, to answer the question as follows: ''I wish you would state whether or not you found any minerals, or whether the rock is of such a character as usually bears minerals?'' by saying: ''The only possible place in any of this ground that I have described, was over in section 10, where I would expect to find any mineral and that would be in the diabase. For that reason, we examined that very thoroughly and found several broken, fractured zones. I went so far as to have assays made of that rock and got absolutely nothing from it''; and in overruling the objection of defendant interposed to said question, upon each and all of the ground as stated and set forth in the last assignment of error herein, to wit, assignment 44. (Exception 22.)

46. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indications of mineral on said section 14?" by saying: "I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 27.)

47. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral on section 12, township 11 north, range 16 west?" by saying: "On the southwest quarter of the southwest quarter, there was a fractured zone there in igneous material that showed iron stains, but I do not believe it would be considered mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 29.)

48. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did you find any indication of mineral in section 8, township 11 north, range 15 west?" by saying: "No, sir, I did not"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 30.)

49. The Court erred in permitting the witness, Oscar J. Reynolds, to answer the question as follows: "Did

you examine section 18, township 11 north, range 15 west?" by saying: "I did, and saw nothing there to indicate that it was mineral in character"; and in overruling the objection of defendant interposed to said question, upon each and all of the grounds as stated and set forth in said assignment of error 44 herein. (Exception No. 31.)

50. The Court erred in granting the motion of plaintiff to amend the complaint on file herein on its face, by adding to the last line of the prayer of said complaint: "And for interest thereon"; and in overruling the objection made by defendant to the allowance of such amendment. (Exception No. 39.)

51. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1891, marked "Plaintiff's Exhibit No. 5," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to said Missoula Mercantile Company. (Exception No. 01-A.)

52. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of

Missoula Mercantile Company for the year 1892, marked "Plaintiff's Exhibit No. 6," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company and that the Florence Hotel and Eddy Block and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-B.)

53. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1893, marked "Plaintiff's Exhibit No. 7," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Florence Hotel and Eddy Block, and also the Hammond Block, were assessed to Missoula Mercantile Company. (Exception No. 01-C.)

54. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula relating to the assessment of Missoula Mercantile Company for the year 1894, marked "Plaintiff's Exhibit No. 8," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the said Bonner Mill property,

the Florence Hotel and Eddy Block, Eddy residence, E. L. Bonner residence, "W. H. Hammond residence $2500" and "W. H. Hammond, Levasseur house $400" were assessed to the Missoula Mercantile Company. (Exception No. 01-D.)

55. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 9," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that 6,750,000 feet of lumber and 4,000,000 feet of logs were assessed to Missoula Mercantile Company, and that the Florence Hotel and Eddy Block were assessed to Missoula Mercantile Company. (Exception No. 01-E.)

56. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of Missoula Mercantile Company for the year 1890, marked "Plaintiff's Exhibit No. 10," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the Bonner Mill property was assessed to Missoula Mercantile Company and that the Florence Hotel and Eddy Block, and also the Fowler Mill, the Tyler Mill, the McClain Mill and the Silver Thorn Mill and outfit, were assessed to Missoula Mercantile Company. (Exception No. 01-F.)

57. The Court erred in admitting in evidence a certified copy of part of the duplicate assessment-book of the County of Missoula, relating to the assessment of the Missoula Mercantile Company for the year 1895, marked "Plaintiff's Exhibit No. 11," over the objection of defendant that the same was incompetent, irrelevant, immaterial, hearsay and *res inter alios acta,* and from which it appeared that the Bonner Mill property was assessed to the Missoula Mercantile Company, and that the Hammond Block, Florence Hotel and Eddy Block, and Eddy residence; also "W. H. Hammond residence $2500" and "W. H. Hammond, Levasseur house $400," were assessed to Missoula Mercantile Company. (Exception No. 01—G.)

58. The clerk of the Court and the Court erred in taxing and the Court erred in confirming the taxation of costs herein made by the clerk in this, that the mileage, amounting in all to the sum of one hundred seventy-eight and 30/100 dollars ($178.30), of seven certain witnesses coming from without the Northern District of California, was computed upon the mileage actually and necessarily traveled by said witnesses within said District, whereas the proper mode of computation was to allow to exceed one hundred miles going and returning for each witness, that is to say, not to exceed ten dollars ($10) for each of said witnesses, which would amount in the aggregate to the sum of seventy dollars ($70), thereby decreasing the amount of said item in the sum of one hundred eight and 30/100 dollars ($108.30).

Brief of the Argument.

1. THE EVIDENCE IS INSUFFICIENT TO CONNECT DEFENDANT WITH ANY CONVERSION THAT MAY HAVE BEEN PROVED.

Review of the Evidence.

Plaintiff's theory as to the basis of defendant's responsibility in the premises is stated by the Court in its charge to the jury (Tr. p. 759):

> "The theory advanced by the plaintiff in this case as to the method pursued in the alleged conversion is that the lumber sued for was taken as the result of a continuing series of acts covering a number of successive years, but all a part and parcel of one general unlawful scheme and arrangement entered into between the defendant and his associates under the guise and form of different corporations organized by them with the intent, and designed to accomplish their purposes, of appropriating such lumber; and that the operations to that end were carried on by such corporations by the means of establishing different mills and logging camps in the names of, or conducted by, different individuals or corporations, but all in fact connected and acting in concert, and all under the general direction and management of the defendant for said corporations. Not that the defendant was absolutely in control of such corporations or nominally their general manager, but that the operations carried on to take and appropriate the plaintiff's lumber were in a general way under defendant's direction and control.
>
> If you find that this theory is sustained by the evidence, it would establish an unlawful taking and it will not be material to the defendant's responsibility that he should be shown to have been immediately present on each occasion that lumber was taken and personally directing the operations. It will be sufficient if it appear that any lumber so taken was cut and carried away as a result of the

> general directions or instructions of the defendant in pursuance of such concerted plan, and was subsequently appropriated by defendant for the benefit of himself and the corporations named with a knowledge that it was the property of plaintiff."

This topic calls for an elaborate review of the logging and milling operations upon the Blackfoot and Hell Gate; of the persons, including corporations, by whom these operations were conducted and of the relationship of defendant thereto. It necessitates a consideration of the economic life of that country in those early days. From an industrial and economic standpoint the early eighties in Montana were far more primitive than is indicated by the date. It was not until '83 that the Northern Pacific Railroad was completed—and then only technically completed at that, for the purpose of earning its land grant—and communication by rail established between Montana and the outside world. California, prior to the coming of the transcontinental railroad, furnishes no index to these pioneer times in Montana, for, unlike California, Montana was without internal or other water communication.

Acts, such for instance as the manager of a general country store telling would-be lumber camp laborers at what mills they might find employment, have in themselves no sinister significance anywhere and particularly when the economic relation of a pioneer country store to the other industries surrounding it is fully understood. And here, as with all human associations, traditions and methods of doing business, such course of conduct generally persists for a con-

siderable while after the conditions which are responsible for its existence have ceased to exist.

With these preliminary observations we will proceed to a consideration of the relation of defendant in his business activities with the industrial life of western Montana and particularly its lumber industry during the period charged in the complaint, that is, from January 1, 1885, to January 1, 1895, and also prior thereto in so far as such earlier activities may throw light on the particular period under consideration. This will involve an examination of the testimony of the defendant, of the witnesses, W. H. Hammond and Geo. W. Fenwick, who were more particularly connected with the operations in the Blackfoot and Hell Gate respectively. Then we will consider the testimony offered by the Government of former employees and officers in some of the companies with which defendant was connected as a stockholder or director and of loggers, teamsters and contractors engaged in the woods, which evidence plaintiff contends is sufficient to establish such a degree of participation on defendant's part in the conversion alleged to have been committed as that defendant may be held personally liable therefor. In doing this we shall endeavor to make a complete presentation of the facts so that our opponent may be able to concede the facts are as stated in our brief and confine himself to a consideration of the inferences which may be legitimately drawn from those facts. This method may prove tedious. It certainly is more work for ourselves; but in the long run we feel confident it will save time and effort of this Court in what

we know will be its painstaking effort to do justice in the premises.

(A) *The Montana Improvement Company, Its Origin, Activities and Liquidation and as to Defendant's Direct Personal Relation Thereto.*

Defendant went to reside in Montana in 1872. He settled in the town of Missoula, then containing about 400 inhabitants, and was there employed as a clerk by E. L. Bonner & Co., a firm engaged in trading with the Indians and trappers, in horse dealing and in the general merchandise business. E. L. Bonner and Col. R. A. Eddy comprised the firm. In 1876 this copartnership was dissolved and a new copartnership known as Eddy-Hammond & Co. was organized to succeed to the business of the said E. L. Bonner & Co., which was comprised of Bonner, Eddy and defendant. Defendant took a one-third interest in the firm for which he paid $4000 in cash and the balance of some $3000 or $4000 he got credit for, which he afterwards paid up. This copartnership existed until August, 1885, when Missoula Mercantile Company, a corporation, was organized to take over the business of the copartnership. This copartnership engaged in the same line as the said E. L. Bonner & Co. and the business was done almost entirely on credit (Tr. pp. 639-40; pp. 686-7). Defendant thus describes the course of business in the matter of extending credit during the life of Eddy-Hammond & Co., which was likewise followed by Missoula Mercantile Co.:

> "At the commencement of their business, and in fact, during the existence of the copartnership, their business was largely with the farmers, with

the miners and with the fur traders. We had a large Indian trade, which extended as far north as the British line; we also had some dealings with the small saw-mills and flour-mills that were in the country at that time. As I say, the business was largely done on credit, and when we supplied customers with goods, we generally had to finance them and take care of them until such time as they could sell their crops or their furs or until the stock raiser could sell his cattle. We advanced them provisions or we advanced them money. We advanced them money to pay their taxes and paid their men. At that time there were farmers in the vicinity who were our customers; it was quite an agricultural country. We had quite a large farming trade in the Bitter Root Valley and in the matter of the payment of men, this method was extended to the farmers as well as our other customers. The method by which credit was extended, with reference to the form of the paying out of goods or money, was as follows: We credited, for instance, different farmers; if one farmer was indebted to another and didn't have the money to pay him, he would frequently give an order on Eddy-Hammond & Company to have his account charged up to the party's account who gave the order. That was so general in that section of the country that transactions of that kind came to be known as Bitter Root turns. In a sense, one man advanced money to pay another man's debts. He sometimes collected a bill from the farmer, but did not get any money; it was charged up to another farmer, to another customer. There were sawmills in this country in the State of Montana in that vicinity prior to the inception of the Northern Pacific Railway; we had dealings with sawmills at that time. We advanced them goods and we dealt with the sawmills the same as we dealt with the farmers and stockmen. In reference to the payment of their men, they gave orders on our firm for the payment of their men, which we ac-

cepted and paid and charged up to them. At no time was the firm of Eddy-Hammond & Company a dealer in lumber. It did not buy or sell lumber at all. The firm of Eddy-Hammond & Company sold out its business to the Missoula Mercantile Company in August, 1885. After its organization, the Missoula Mercantile Company carried on business along the same lines that Eddy-Hammond & Company had carried it on; it extended credit to the farmers, stockmen, sawmill men, contractors and builders of the railroad, traders and miners; it continued to do the same class of business. In the matter of extending credit, both for the money paid out and for goods, wares and merchandise purchased—we accepted orders from the customers. In fact, it was necessary in that country, at that time, when you undertook to carry a customer that you had to furnish him money to pay his men and to do his business until such time as he could raise his crop or sell his product and pay his bills. There was no difference in the method of extending credit practiced by the Missoula Mercantile Company from that practiced by its predecessor, Eddy-Hammond & Company. The Missoula Mercantile Company never dealt in lumber; it never owned any sawmills, nor did it even own any stock in any corporation interested in sawmills'' (Tr. pp. 641 et seq.).

Besides the firm of E. L. Bonner & Co. above mentioned, of which Bonner and Col. Eddy were the members, for whom defendant clerked, which developed into the firm of Eddy-Hammond & Co., and later Missoula Mercantile Co., there was another firm of the same name of E. L. Bonner & Co., a copartnership created in 1881 for the purpose of contracting with Northern Pacific Railroad Company to furnish it with ties, piles and lumber and for the clearing of the right of way for

about 280 miles on the main line of that railroad. Bonner, Col. Eddy and defendant were the members of that firm and in addition thereto J. H. Robertson, who was not at any time a member of the firm of Eddy-Hammond Co., or a stockholder in Missoula Mercantile Co. (Tr. pp. 643, 686). This firm received the appointment from Northern Pacific Railroad Company in 1881 to take from the public lands adjacent to the line of the railroad material for the construction of the railroad, which right was permitted under the United States Statute creating Northern Pacific Railroad. This appointment was made in pursuance of the Statute and Regulations of the United States Land Office in relation thereto. A copy of the appointment is set out (Tr. pp. 644 et seq.).

Defendant describes (Tr. pp. 650-1-2) the operations of E. L. Bonner & Co. in furnishing piling and lumber for Northern Pacific Railroad Company construction, from which it appears among other things that great quantities of timber, unidentifiable from that cut at divers later dates, were taken from many of the same sections of land along the Hell Gate which are involved in this action.

The railroad business of E. L. Bonner & Co. was taken over by Montana Improvement Co. (Limited), incorporated August 8, 1882, and its Articles of Incorporation are set forth (Tr. pp. 390 et seq.). The principal office of Montana Improvement Company was at Deer Lodge where the president, E. L. Bonner, resided. Shortly after the completion of the Northern Pacific Railroad Bonner came to Missoula to reside,

and at that time—the fall of 1885—the principal place of business of the corporation was changed from Deer Lodge to Missoula. While the corporation was incorporated in 1882 it did not start active business until after the Northern Pacific Railroad was completed. It went into active business in 1884 and out of active business in 1885 (Tr. pp. 653, 4, 5). The defendant was treasurer and manager of that company—manager until about 1885 (Tr. p. 694). July 2, 1883, a contract was entered into between Northern Pacific Railroad Company and Montana Improvement Company (Tr. pp. 710 et seq.) which among other provisions gave the Railroad Company 51% of the stock of Montana Improvement Company and Montana Improvement Company had the right for twenty years to enter upon timber lands in the then territory of Montana and Idaho granted by the Act of Congress to said railroad and cut timber therefrom, making payment therefor. This was supposed to be a very valuable contract by the promoters of Montana Improvement Company, of which Bonner was the head and front (Tr. p. 698). The said Mineral Land Act of June 3, 1878 (with the purposes of which this Court is familiar; 121 Fed. 504; 133 Fed. 380) conferred the right on residents of Montana, other than railroad companies, to cut timber on mineral lands for building, mining, agricultural and other domestic uses. As the grant to Northern Pacific Railroad of the odd numbered sections within the limits of the grant did not attach to such lands as were mineral, it was expected that this corporation as a resident of Montana would be able to cut timber under the

Mineral Land Act of June 3, 1878, where the physical conditions warranted same, and where they did not that the corporation could avail itself of the railroad's right as proprietor of the odd numbered sections or the land that would become such on survey. Thus the development of Montana, so bound up with the lumber industry not only furnishing lumber for construction purposes but as well for mining timbers and stulls, might proceed without embarrassment. However, Commissioner Sparks, of the General Land Office, took the position that the ownership by Northern Pacific Railroad Company of stock in Montana Improvement Company would prevent the latter corporation from availing itself of the Mineral Land Act of June 3, 1878 (Tr. pp. 697-700), and in July, 1885, in consequence of the position taken by the commissioner (which both corporations were advised by their attorneys was not tenable, Tr. p. 700) Montana Improvement Company decided to go out of business, sell its property and liquidate (Tr. pp. 655, 700).

The attitude of the commissioner frustrated the very purposes of the organization of Montana Improvement Company which were that its operations would offend neither public nor private rights. It was often difficult to determine what were mineral lands within the meaning of the grant to the Northern Pacific Railroad. So complicated, indeed, that a commission was finally created by Congress to determine this fact. The individual operator in Montana cutting under the then unquestioned and broadly construed license furnished by the Mineral Land Act of July 3, 1878, found himself

confronted by the rights of the Northern Pacific Railroad. Combining the sanction of the license with the railroad's right (whatever it was) seemed the logical way to proceed without offending either public or private rights. The liquidation of Montana Improvement Company was due to the attitude of the General Land Office and not on account of any other law-suits brought by the Government against that company—referred to by plaintiff's witness Hathaway (Tr. pp. 204, 224, 228, 235). These suits were brought considerably after Montana Improvement Co. had entered upon its liquidation (Tr. p. 99) and involved the right of Northern Pacific Railroad and its grantees to cut timber on railroad lands prior to their survey. Montana Improvement Co. was a defendant with Northern Pacific Railroad in an action brought by the Government for an accounting and to restrain the cutting of timber on unsurveyed lands. This action numbered 115 in the records of Second Judicial District of Montana Territory was brought March 16, 1886. It was brought on the untenable theory that the Government and Northern Pacific Railroad were tenants in common. The demurrer of Montana Improvement Co. to the complaint was sustained and the case proceeded against the railroad alone, which prevailed in the trial Court. In the meantime Montana acquired statehood. So we find the affirmance of the trial Court's decision in

U. S. v. Northern Pacific Railroad, 6 Mont. 351; 12 Pac. 769.

The Government took an appeal to the U. S. Supreme Court, but later dismissed same (140 U. S. 703; 35 L. Ed. 593).

And now, to return to the limited activities of the Montana Improvement Company and its liquidation:

Defendant had a one-fifteenth interest in the stock of Montana Improvement Company. Other stockholders besides Northern Pacific Railroad Company were Bonner and Eddy. Hathaway had a little stock (Tr. p. 200) and a man named Conklin had 250,000 shares, which would be one-eighth (Tr. p. 655). Marcus Daly appears to have been one of its incorporators (Tr. p. 391). Montana Improvement Company acquired the mills at Wallace. Wallace—formerly called Clinton—was on the Hell Gate River between Bonita and Bonner —eight miles down stream or West from Bonita and fifteen or seventeen miles East of Missoula. These Wallace mills were owned by a man named Katchin and had been operated in the business of furnishing bridge timbers and other lumber for the Northern Pacific Railroad construction. Montana Improvement Company had a shingle mill at Noxon, Montana, about one hundred miles *West* of Missoula. It acquired the Thompson or Allen mill, which had been operated at Thompson Falls and which was subsequently erected at Bonita. The company had lumber yards at Butte, Helena and Deer Lodge. It commenced the construction of a dam on the Blackfoot River in 1884 (at a point which subsequently became the town of Bonner). The dam was not completed but went out in the flood in the spring of 1885.

When Montana Improvement Company decided to liquidate and go out of business it disposed of its property as follows:

The remnant of the company's dam at Bonner was sold to W. H. or Henry Hammond as he is more generally called. The Thompson or Allen mill was sold to Fred Hammond at a price which included the cost of setting it up at Bonita,—this being attended to by Montana Improvement Company. Montana Improvement Company never operated the mill. One of the mills at Wallace was sold and moved away. The other continued to operate at Wallace (it is not pretended that these mills at Wallace manufactured any of the timber involved in this action) for a few months later, perhaps until the spring of 1886, when it was disposed of and moved away. The three lumber yards were sold, that at Helena, which figures throughout the testimony, to V. H. Coombs, which subsequently became Helena Lumber Company. Montana Improvement Company retained no interest in any of these properties. The shingle mill at Noxon burned (Tr. pp. 652-656).

Further light is thrown on these earlier operations of Montana Improvement Company by the witnesses, G. W. Fenwick and W. H. Hammond who later became identified with the Bonita and Bonner plants respectively.

Fenwick was employed by Montana Improvement Company at Wallace for about two and a half years prior to his purchase from Fred Hammond of the Bonita Mill in May, 1886 (Tr. p. 537). Eddy & Bonner employed him. Defendant did not have much to do with Montana Improvement Company at that time; he was manager nominally, not actively. As employee of Montana Improvement Company at first Fenwick's

duties were as shipping clerk, shipping left-over lumber that had been sawed in the work for the railroad under E. L. Bonner & Co.'s contract, which lumber had been taken over by Montana Improvement Company from E. L. Bonner & Co. Montana Improvement Company was not operating the mills at Wallace when Fenwick went there—Katchin was—the company commenced to saw lumber at Wallace in 1884 and Fenwick billed most of the lumber during the earlier period of his employment at Wallace to Northern Pacific Railroad for the completion of its construction work. W. H. Hammond was there a part of the time looking after the mills that were operated there in 1884. Then the work at Wallace ceased and Fenwick left the employ of Montana Improvement Company and after a few weeks bought the Bonita Mill from Fred Hammond (Tr. pp. 575-8, 696).

W. H. Hammond came to Montana in 1881 and was employed in building a wagon road for the Northern Pacific Railroad; then he had a contract with E. L. Bonner & Co. cutting ties and piling for the Northern Pacific, which occupied some two years. Later he worked for the Montana Improvement Company beginning in the latter part of 1884. He looked after the mills. Mr. Bonner was considered head of the company —more particularly financial head. Mr. Bonner and Mr. Eddy were the head men (Tr. p. 474). W. H. Hammond was in charge of the business at Wallace until some time in 1886, continuing in their employment while he built the first unit of the mill known as the Bonner

Mill and after the Blackfoot dam site had been transferred to him.

While so employed by the Montana Improvement Company he was cleaning up their old mills and looking after the remnants of their business (Tr. pp. 473-476, 696). The deed conveying the dam site from Montana Improvement Company to W. H. Hammond, dated July 3, 1885, is set out at Transcript page 430. He paid three hundred dollars for the old shacks and equipment and whatever passed by the quitclaim deed (Tr. p. 475).

Sydney C. Mitchell, a government witness, who was employed at various times at Wallace, Bonita and Bonner, testified (Tr. p. 92) in corroboration of the testimony of defendant, W. H. Hammond and Fenwick. He was employed by A. B. Hammond to work at Wallace (Tr. p. 93), but whether for the Eddy Hammond Company or Montana Improvement Company he did not know. He went to Wallace June 17, 1885—the day after the first Blackfoot dam went out (Tr. p. 98) and he went to work for G. W. Fenwick at Bonita in the fall of the following year—1886.

We have now considered the origin of the operation of G. W. Fenwick at Bonita and W. H. Hammond at Bonner. It is not claimed by the Government that any timber was cut on the Blackfoot before the winter of 1885 when Henry Hammond was building his dam and mill at Bonner. In the case of G. W. Fenwick, however, when he acquired the Bonita mill in May, 1886, it had already been in operation and hence

it becomes necessary to consider more in detail the alleged trespasses committed in the Hell Gate prior to that time and the defendant's relation thereto. An inventory was made when Fenwick bought the Bonita operation from Fred Hammond. He paid twenty-five or twenty-seven thousand dollars for the property, which besides the mill included railroad spur connections, the necessary buildings, cook house, etc.; also a complete logging outfit (Tr. pp. 538-9) and in the neighborhood of one million feet of logs and of sawed lumber in the mill and mill pond (Tr. p. 582). Fenwick could not tell from what particular sections the lumber and logs came from. Some were logged on what upon survey became odd numbered or railroad owned sections and admittedly not involved in this action (Tr. p. 596).

There is nothing in the testimony of the Government which denies or attacks the bona fides of the transaction between Montana Improvement Company and Fred Hammond already adverted to, whereby the so-called Thompson Mill was sold for a price which included its removal from Thompson Falls and erection at Bonita by Montana Improvement Company. There is nothing in conflict with the testimony that Fred Hammond conducted these logging and mill operations for his own account. The record shows that Fred Hammond is dead.

The Government witness, William A. Cook (Tr. 121), was section foreman of Northern Pacific Railroad at the time the siding was put in from the main track of Northern Pacific Railroad to the mill at Bonita. This was in the late summer of 1885 (witness was not sure

whether it was 1885 or 1886, but that it was the later year is made clear by the testimony of other witnesses). The siding was put in before the mill in order to ship the mill in in the cars. This witness had concluded that Eddy, who was in charge of the construction of the mill and siding, was representing Eddy Hammond & Co., but this appears to have been pure guess work (Tr. pp. 129-31). As we have seen, Missoula Mercantile Company took over the business of Eddy Hammond & Co. about August 20, 1885 (Tr. pp. 308 et seq.) and Cook testifies that the siding was put in in the late summer. Eddy was there as vice president of Montana Improvement Company engaged in the execution of its contract with Fred Hammond to transport the mill to Bonita and sell it set up. The important thing, however, is Cook's very clear testimony that Eddy had this operation in charge and that Eddy was about the mill all the time when it was being constructed. He thinks, if he remembers right, that defendant was there two or three times (Tr. pp. 122-3).

It should here be recalled that the Government has not claimed in its complaint, or otherwise, that defendant is responsible for any conversion through his relationship as partner, or otherwise, in the firm of Eddy Hammond & Co. The concerns named are Montana Improvement Company, Blackfoot Milling & Manufacturing Company, The Big Blackfoot Milling Company and Missoula Mercantile Company.

The Government witness, Harley, testifies in corroboration that he worked in and about Bonita, cutting timber, in 1885, for Fred Hammond. This was in the win-

ter and fall of 1885 and later, in May or June, 1886, his employment with George W. Fenwick commenced (Tr. pp. 258-9).

The Government witness, Hathaway (Tr. p. 196), sixty-seven years of age at the time of testifying and without an occupation to keep his mind alert, who admits he has not a good memory (Tr. p. 243), which also appears from the frequent contradictions and corrections in his testimony, nevertheless knew that the Fenwick mill was established at Bonita somewhere about 1885 and that Eddy had it in charge—looking after the erection of the mill. He testified the mill was run by Fred Hammond, who owned it (Tr. pp. 198, 223). He did not think defendant had any interest in the mill when it was under the management and control of Fred Hammond, because he knew that Fred Hammond sold out to George W. Fenwick (Tr. p. 204); that it was the Montana Improvement Company, not Eddy-Hammond & Co., that sold the mill to Fred Hammond (Tr. p. 223). In common with some other witnesses, he speaks of Eddy-Hammond & Co. as having been in the lumber business (Tr. p. 223), which is contrary to defendant's testimony that a firm known as E. L. Bonner & Co. was the name of the concern engaging in that business, which is also confirmed by the witness, Keith, hereinafter referred to, and the record evidence furnished by the appointment from the Northern Pacific Railroad Company, but, in any event, this is an immaterial matter, for Hathaway is positive that from the time of organization of Montana Improvement Company the co-partnership ceased entirely to have any lumber operations.

From that time on (1882) the co-partnership was in the mercantile business, which was ultimately sold to Missoula Mercantile Company (August, 1885) and a lot of employees taken in as stockholders (Tr. p. 223).

John M. Keith, now the president of a bank in Missoula, testified (Tr. p. 418) that he was employed by Eddy-Hammond & Co. in the year 1881, as a clerk behind the counter, and in 1882 was taken into the office of that concern and from then until the organization of Missoula Mercantile Company in August, 1885, was in charge of the office and the books of Eddy-Hammond & Co., and thereafter until 1888 occupied a like position with respect to Missoula Mercantile Company. He testified that the old firm of Eddy-Hammond & Co. was not, as a firm, engaged in the lumber business. Its three members, however, in addition to Robertson, were thus engaged as a copartnership under the firm name of E. L. Bonner & Co., to which Montana Improvement Company succeeded. He was never an employee of Montana Improvement Company and had no knowledge of it other than as a name (Tr. p. 423).

Defendant himself testified (Tr. p. 671) that he was at Bonita Mill but once during its construction and after that may have been at Bonita Mill once or twice; that he never gave any orders to any persons about any transaction in connection with the logging operations at the Bonita Mill (Tr. p. 667); that he was never on the lands that are reported as having been cut over (Tr. p. 668) and that with reference to the cutting upon the Hell Gate by Fred A. Hammond, or by Fenwick, during the time their mills were in operation he had no knowl-

edge as to the place or places from which they, or either of them, at any time procured any logs for their mill; that he did not know where they were cutting their logs (Tr. p. 683).

Government witness Hathaway testified that the sale from Montana Improvement Company to Fred Hammond and from Fred Hammond to George W. Fenwick was what it purported to be, a straight out and out, absolute transfer of the property (Tr. p. 227). He further testified that Fred Hammond bought the mill from Montana Improvement Company very soon after Montana Improvement Company brought it down and that Eddy was up there some little time and then Fred Hammond made the deal and bought the mill. "It was his mill and he sold it"; that the Montana Improvement Company did not run the Bonita Mill for more than a month or two—only a very short time—they started building the mill. They had to build bunk houses and stuff like that in there, some little lumber went for that "and then Fred went in and took charge and bought it".

We think the foregoing correctly sets forth all the testimony bearing on the relation of A. B. Hammond to Montana Improvement Company and of Montana Improvement Company to the mill at Bonita until Fred Hammond disposed of same to G. W. Fenwick.

(B) *The Bonita Mill of George W. Fenwick, the Hell Gate Timber. Defendant had no Direct Personal Relation Thereto.*

The purchase of the Bonita Mill by George W. Fenwick in May, 1886, for twenty-five or twenty-seven thou-

sand dollars (Tr. p. 538) from Fred Hammond has already been adverted to. The purchase price was evidenced by notes payable at divers dates. These notes were taken over by Missoula Mercantile Company in settlement of Fred Hammond's account with that company. Fenwick paid the notes (Tr. 426). Defendant testified that he did not participate in any of the negotiations of the sale of the Bonita Mill plant from Montana Improvement Company to Fred Hammond or from Fred Hammond to George W. Fenwick (Tr. pp. 656-7), though he knew of the latter (Tr. p. 696). The Government witness, Hathaway, recollected taking the inventory upon the sale from Fred Hammond to George W. Fenwick (Tr. p. 227) and that he did this at the request of Fred Hammond (Tr. p. 232). Later he requested that he be recalled, for he felt positive on further reflection that the defendant had asked him to take the inventory (Tr. pp. 227, 236-238). The change in the testimony seems only to have been of concern in the mind of Hathaway and he wound up by saying: "That is one thing A. B. Hammond can tell himself, if he says it ain't so you can take his word for it" (Tr. p. 242).

In this connection defendant testified that he had a very slight recollection on the subject. His recollection is that Fred Hammond and Fenwick had negotiated and come to an understanding and that they agreed on Hathaway to take the inventory for them and assist them. He has no recollection of sending Hathaway there, or telling him to go there, or anything of that kind (Tr. pp. 656-7). Fenwick testifies that his negotiations were altogether with Fred Hammond and that he had no negotiations

upon the subject with A. B. Hammond. Hathaway was selected to take the inventory because it was agreed upon between Fred Hammond and himself. How Hathaway came to come up to Bonita he did not know. "I may have sent word to him myself, or Fred Hammond may have done it, or I may have requested anyone in the office in Missoula to tell him" (Tr. pp. 555-6).

Fenwick testified (Tr. pp. 556-7) that defendant had no interest directly or indirectly in the Fenwick purchase of the Bonita Mill; nor did anyone else. The matter was a strictly private arrangement between Fred Hammond and himself and none of the profits of the business went to any other person or corporation than himself (Fenwick). He cut along the Hell Gate country from May, 1886, to May or June, 1891. During the years 1890 and 1891 his operations were very small and when the mill was finally closed in 1891 he went to the Bonner Mill, then operated by Henry Hammond under a lease, where he looked after the general office work, also manufacturing, shipping and taking care of orders. (Tr. 573).

As has already been observed, the land in the Hell Gate was not surveyed until May, 1902; there were no lines or corners and G. W. Fenwick didn't know whether he was cutting on even or odd numbered sections. The only survey was the territory covered by the Cramer Ranch (Tr. p. 549). As stipulated (Tr. p. 745), the only surveyed lands in the Hell Gate were those portions of Sections 8, 9, 10 and 11 lying north of Hell Gate River as it existed at the date of the survey, to wit, July 17, 1874, and Section 7, surveyed January 14,

1885, in Township 11 North, Range 16 West, M. P. M. Also it is stipulated (Tr. p. 743) that there was a patented placer mining claim in Section 23, Township 11 North, Range 15 West, on the Tyler Gulch, containing 159 acres. At the time of his purchase of the Bonita Mill Fenwick was familiar with the physical characteristics of the Hell Gate canyon and he describes same at Transcript, pages 539 et seq. He believed the land was mineral land within the meaning of the Act of June 3, 1878, Chap. 150; 20 Stats. at Large 88—a belief shared in by the community, the Courts and the Interior Department of the United States, and which belief prevailed until Mr. Justice Holmes, of the United States Supreme Court (Mr. Justice McKenna dissenting) held that the permission provided in the Act to cut timber from the public domain only applied in effect to mining claims or public lands susceptible to entry as such.

U. S. v. Plowman, 216 U. S. 372; 54 L. Ed. 523.

The case last mentioned originated in Idaho and when it was before the Circuit Court of Appeals the point therein involved was deemed to be so well settled by that Court that it was dignified only by a memorandum decision (151 Fed. 1022), Mr. Justice Ross stating that it was conceded by the Government that the facts in the case were substantially identical with those presented in the cases of

U. S. v. Bassic, 121 Fed. 504-57 C. C. A. 624, and
U. S. v. Rossi, 133 Fed 380, 66 C. C. A. 442.

The cases last mentioned reviewed and approved what had been the uniform course of decision of all the trial

Federal Courts. The U. S. Circuit Court of Appeals for the Eighth Circuit reached the same conclusion.

Morgan v. U. S., 169 Fed. 242.

In fairness to Mr. Justice Holmes it should be stated that the report of the case of U. S. v. Plowman supra shows that there was no appearance for the Government's opponent.

Referring to the said Act of June 3, 1878, c. 150, Mr. Justice Morrow, speaking for the Court in the case of U. S. v. Rossi, supra, stated:

> "This Act was passed, according to the views of Secretary Teller, of the Interior Department, expressed in 1 L. D. 697, to establish by positive enactment a right claimed and exercised by lumbermen for a period of about 30 years without interference on the part of the Government—the right to appropriate the timber on government lands, manufacture it unto lumber, and furnish it to the millmen, the miners, the farmers and other inhabitants of the district who could not or did not wish to do the actual cutting and manufacturing for themselves individually. He further said:
>
> " 'The great object of the governmental supervision of the cutting of timber in those states and territories ought not to be to compel payment for timber so cut, but to prevent unnecessary waste, the cutting of the small trees under the size prescribed by the department, and to prevent waste by fires and other means'.
>
> "The rules and regulations of the Secretary of the Interior in force until February 15, 1900, were in accord with these views, permitting owners of sawmills to cut timber and manufacture it into lumber for sale, under the requirement that it be sold to citizens of the state or territory wherein it was growing, and for 'building, argricultural, mining, and other domestic purposes' ".

The witness Fenwick stated that at the time of his purchase of the Bonita Mill he was aware of the ruling of Secretary Teller, just referred to in the opinion of the Court in U. S. v. Rossi, supra (Tr. p. 559). Subdivision 4 of the said ruling of Secretary Teller is found at 1 Land Dec. p. 698, and describes the character of the land, in reference to its physical characteristics, which he ruled came within the meaning of the Act as land upon which timber might be cut for the uses prescribed in the Act. This description is quoted and relied upon by the Circuit Court of Appeals for the eighth Circuit in the case of Morgan v. U. S., supra, 169 Fed. at page 246, and is as follows:

> "Where the lands are situated in districts of country that are mountainous, interspersed with gulches and narrow valleys, and minerals are known to exist at different points therein, such lands, in the absence of proof to the contrary, will be held to be mineral in character; but where there are extensive valleys, plains or mountain ranges, and no known minerals exist, the land may be considered and treated as non-mineral".

Concerning the description given by Secretary Teller of lands that might be deemed mineral within the meaning of the Act, the witness, Fenwick, testified that in his judgment the land he was about to cut over upon his purchase of the Bonita Mill was of the character that would bring it within the terms of the ruling (Tr. p. 558). There were other circumstances than this that led Fenwick to believe it was such mineral land and these circumstances are set forth (Tr. pp. 558-565; 588-89; 593-4).

In purchasing the Bonita Mill Fenwick was governed by the advise of his attorney, the late T. C. Marshall, of Missoula, and was acting under the advice of his counsel before and during the negotiations that led up to the purchase. As he says:

> "I was led to believe and I sincerely believed that I was strictly acting in accordance with the law in going on this land, which I believed to be mineral".
>
> (Tr. pp. 559; 585.)

A rigid cross-examination of the witness, Fenwick, did not serve to cast any doubt as to his conference with counsel and the belief that he was acting within the law in the premises (Tr. pp. 586 et seq.).

Just at that time there was much local discussion concerning rules promulgated by Secretary of the Interior, Lamar, on May 7, 1886, and Fenwick thought his attention had been directed to the rules last mentioned (Tr. p. 587). This was a circular issued by Commissioner Sparks, of the General Land Office, to Registers and Receivers and Special Agents, and will be found in 4 Land Dec. 521. These rules became effective June 1, 1886, and all existing rules and regulations heretofore prescribed under the Act inconsistent therewith were thereby revoked. By paragraph 4 of this circular it was provided as follows:

> "All cutting of such timber for sale or commerce is forbidden. But for building, agricultural, mining and other domestic purposes each person authorized by the Act may cut or remove for his or her own use by himself or herself, or by his, her or their own personal agent or agents only."

Before the issuance of this circular the requirement that persons in the territory using the lumber for the purposes designated in the Act should cut the timber individually, or through an agent, and that cutting of timber for sale or commerce was forbidden, had not existed. This limitation did not remain in force very long and new rules and regulations were issued August 5, 1886, to take effect September 1, 1886, which did away with this limitation (5 Land Dec. 129).

As Mr. Justice Morrow observes in the case of U. S. v. Rossi, supra, the rules and regulations of the Secretary of the Interior which continued in force until February 15, 1900, permitted the cutting of timber commercially for the purposes mentioned in the Act and cutting was not restricted to doing it personally and through agents. By the rules and regulations of February 15, 1900, referred to by Judge Morrow, the cutting of lumber commercially was again prohibited and it is interesting to note (133 Fed. at page 384) that our Circuit Court of Appeals held in this case that the prohibition was one which was not within the power of the Secretary of the Interior to make.

Be this as it may, at the time Fenwick bought the Bonita plant the Sparks circular (4 Land Dec. 521) to take effect June 1, 1886, had been promulgated and apparently cutting could only be lawfully done by one acting as agent for another who was actually going to put the property to one of the uses specified in the Act. The result is we find Fenwick arranging to comply with this regulation which, as we have seen, remained in force but a few months.

Mr. Fenwick had a contract in writing with Marcus Daly, of the Anaconda Mining Company, by which Fenwick was appointed as the agent of Daly to cut this timber from the public lands and contained other provisions as to price, etc. (Tr. pp. 544-5). Before he completed the purchase of the Bonita plant from Fred Hammond he also arranged a contract with Marcus Daly to back him (Fenwick) to any reasonable amount he (Fenwick) required to run his operations there, and Marcus Daly in fact advanced him funds during the early stage of his, Fenwick's, operations. Later it was not necessary (Tr. pp. 569-70).

On cross-examination concerning this transaction with Marcus Daly the witness further described it at Transcript pages 592, 597-8 and 600. From this it appears that timbers were to be furnished for mining purposes; that Mr. Fenwick was to furnish him with lumber, saw it and ship it to him. Fenwick had no contracts with any other people to whom he sold lumber and he sold nearly all of his lumber to Daly. It also appeared that the contract contained an indemnity clause which was to save Fenwick harmless against any claims for stumpage that might come thereafter. Mr. Fenwick testified (Tr. p. 597) that he needed the protection of the indemnity clause for he knew that if for any reason the land should be held not to be mineral land the Northern Pacific Railroad Company would claim all of the odd sections. He believed the land was mineral land and that the Railroad Company had no right to what, when surveyed, would be the odd numbered sections, but he wanted to fortify himself on all sides. He thought (Tr.

p. 600) the question of whether or not the land was mineral land might be a question of law as well as a question of fact. That Marcus Daly had arranged to finance Fenwick at the commencement of his operations at Bonita is also in evidence by the testimony of the witness Keith (Tr. p. 425). Hathaway also testified as to Fenwick's contracts with Daly (Tr. pp. 214-15).

Defendant also testified to his belief that the portion of the Hell Gate country involved in this action was mineral land within the meaning of the Act of June 3, 1878, c. 150, and sets forth the basis of his belief (Tr. p. 668).

Woodworth, a civil engineer, went to the Big Blackfoot canyon as a timber inspector for the Northern Pacific Railroad Company in 1888 and was employed in this capacity about ten years (Tr. p. 494). He was there for the purpose of taking care of Northern Pacific timber in the state of Montana (Tr. p. 498). It abundantly appears throughout the record that timber was being indiscriminately cut from the Hell Gate canyon prior to, during, and for that matter subsequent to the period involved in this action; for instance, see Hathaway's testimony (Tr. p. 222); Woodworth's testimony, (Tr. p. 626), and that no stumpage was paid therefor (Tr. p. 221). In the Blackfoot, where there was no suggestion that the lands were mineral lands, the Northern Pacific Railroad charged Henry Hammond and the Big Blackfoot Milling Company, which succeeded him, at the rate of one dollar per thousand feet stumpage for timber cut from lands lying within one mile of the Blackfoot River and fifty cents where it was beyond

one mile (Tr. p. 445) and Woodworth was seeing to it that the railroad got what was coming to it (Tr. p. 496). There can be no question but that the Northern Pacific Railroad shared the common belief that the Hell Gate country was "mineral land" (Tr. p. 601).

The deposition of William K. Wills (Tr. p. 601) was offered in evidence by defendant, though he was called as a witness on behalf of plaintiff, and we submit his testimony shows a general mineral character of the Hell Gate, which under the Act as then and for many years thereafter interpreted, would clearly have authorized the cutting of timber thereon.

Defendant offered in evidence some half dozen "Notices of loccation of mining claims in the Wallace Mining District" (Tr. p. 610) and also (Tr. p. 564) a document evidencing the creation of Wallace Mining District, which was formed by miners and settlers in 1878, which embraces a large portion of the land in the Hell Gate involved in this action (Tr. p. 562).

Fenwick testified (Tr. p. 566) that while he was operating the mill at Bonita he saw the defendant there once or twice, mentioning the occasion of the visits. He testified defendant never gave him any directions as to the management, or the logging business, or concerning his (Fenwick's) operation; that defendant had nothing to do with the sale of Fenwick's lumber or purchase of logs, or cutting of lumber, or its shipment, or even the employment of his men. The government witness, Mitchell, testified that he never saw A. B. Hammond in the Hell Gate country except once, at Wallace, and never saw him at Bonita at all (Tr. p. 103).

(C) *The Bonner Mill, at First of W. H. Hammond and Later of Big Blackfoot Milling Co., the Blackfoot Timber. Defendant had no Direct Personal Relation Thereto.*

We have already learned of the beginnings of the Blackfoot operation and how in July, 1885, W. H., or Henry Hammond, paid three hundred dollars to Montana Improvement Company for the remnants of the dam (together with the shacks and equipment) which that company had attempted to construct at what became the sawmill town of Bonner and which had been washed out. Mr. Bonner represented Montana Improvement Company in making the sale of these remnants to W. H. Hammond (Tr. p. 475). At first this mill was known as the Blackfoot Mill, but as the mill increased in size and as extensive wood-working machinery was installed the settlement and mill became known as Bonner—this in 1888 (Tr. p. 434). W. H. Hammond was sole owner of the mill property until February, 1888, when Blackfoot Milling & Manufacturing Company was incorporated to take it over (Tr. p. 434). The articles of incorporation of Blackfoot Milling & Manufacturing Company are set forth at Tr. p. 386. W. H. Hammond operated the mill individually, just as he owned it; he had no partners; and no one shared directly or indirectly in the profits of his transactions (Tr. p. 434). He became a stockholder to the extent of about one-fourth in Blackfoot Milling & Manufacturing Company and as part of the consideration for the transfer of the mill property to the Company it was agreed that he should have a lease

on the mill property for two years, with the privilege of three, and such lease was actually entered into (Tr. p. 435). He operated this property under the lease for three years, possibly a little longer (Tr. p. 438). He sold the lumber he manufactured. Neither Montana Improvement Company, Missoula Mercantile Company nor A. B. Hammond sold it for him (Tr. p. 439). He operated the property until Big Blackfoot Milling Company was incorporated (Tr. p. 440). Its articles of incorporation are set out at Transcript pages 371 et seq. For aught that appears Big Blackfoot Milling Company is still in existence, plaintiff having put in evidence (Tr. p. 375) certificate of extension of term of existence of this company, showing statutory proceedings taken to that end in July, 1908.

Upon the organization of Big Blackfoot Milling Company in November, 1891, W. H. Hammond became its president and manager and the books of the company were kept at Bonner. Before the formation of Blackfoot Milling & Manufacturing Company and while W. H. Hammond not only operated *but owned,* on his individual account, the Blackfoot Mill, a man by the name of Winstanley kept the books at Missoula. This was from 1885 to 1888 and W. H. Hammond paid Winstanley for his services. Upon the formation of Blackfoot Milling & Manufacturing Company and W. H. Hammond taking a lease on the plant from that Company, the books of Blackfoot Milling & Manufacturing Company were kept at Missoula (Blackfoot Milling & Manufacturing Company had other operations—A. B. Hammond, Tr. p. 660; G. W. Fenwick, Tr. p. 595; besides the mere receipt

of rent for the Bonner Mill property) and W. H. Hammond's books containing the accounts of his operations under the lease were kept at Bonner by a man named Young (Tr. p. 440). W. H. Hammond owned about one-fourth of the stock of Big Blackfoot Milling & Manufacturing Company and was paid a salary of two hundred dollars a month. While operating as lessee, of course, he received no salary (Tr. p. 441). Complete disassociation in every sense of defendant from this Blackfoot or Bonner mill operation, and the logging incident thereto, from its inception until it was sold out to Anaconda Copper Mining Company, in 1898, is conclusively evidenced by the testimony set forth at Transcript pages 441-2.

From the inception of the Bonner lumber enterprise and during all the times mentioned in the complaint a merchandise store was run by W. H. Hammond at Bonner and after Big Blackfoot Milling Company was incorporated there was also a flour mill. The goods for the merchandise store were bought from Missoula Mercantile Company (Tr. p. 471). While W. H. Hammond operated and also owned the Bonner plant and at the time he transferred the plant to Blackfoot Milling & Manufacturing Company and took a lease therefrom W. H. Hammond owned teams and logging equipment which were used in his logging operations on the Blackfoot. On his sale of the plant to Blackfoot Milling & Manufacturing Company he retained his teams and logging equipment (seventy-five or eighty teams with their equipment and the logs that were on the bank of the river). He continued while running the plant

under the lease to operate his teams and logging equipment, but gradually abandoned this method of operation and contracted for his logs, disposing of his teams from time to time as he could. The proceeds of the teams came to him and neither defendant, nor Missoula Mercantile Company, shared in the proceeds. Blackfoot Milling & Manufacturing never furnished him with teams and never engaged in logging on the Blackfoot River (Tr. pp. 471-3).

The occasion for organization of Big Blackfoot Milling Company to take the place of Blackfoot Milling & Manufacturing Company seems among other reasons to have been to bring about a division of the stock into first and second preferred and common stock (Tr. p. 476). Some of the stockholders are enumerated at page 484.

Besides the credit which W. H. Hammond received from Missoula Mercantile Company Marcus Daly, of the Anaconda Mining Company, furnished him with capital for the operation of his mill, at various times fifty thousand dollars, and a man by the name of Walker once loaned him fifty thousand dollars (Tr. p. 485).

Defendant corroborates the testimony of W. H. Hammond as to the interests operating the Bonner Mill from time to time, W. H. Hammond's ownership, the two corporations and the lease, and definitely establishes his (A. B. Hammond's) relation to the enterprise (Tr. p. 661). During the period involved in the complaint defendant was twice up the Blackfoot. Once in the spring of 1886 he went up out of curiosity to

see the log drive—renewing his boyhood acquaintance with such operations as he had seen them on the Penobscot—and in 1888 when he was on a hunting and fishing expedition (Tr. pp. 665-6). Defendant never gave any directions or orders to any one with regard to operations on the Blackfoot (Tr. p. 666).

Defendant testifies that he did not know at any time as to the particular sections either Big Blackfoot Milling Company, or, prior to its organization, W. H. Hammond was cutting timber from on the Blackfoot and he enumerates specifically a lack of knowledge as to timber alleged to have come from the Edgar claim, the land embraced in the Boyd trespass and that cut supposedly under the sanction of the Timber Permit (Tr. pp. 680-1).

The government witness, Hathaway, gave the same version about the Bonner enterprise. How W. H. Hammond sold his mill to Blackfoot Milling & Manufacturing Company and took a lease and then operated the mill and "Whatever he could make out of the mill was his over and above what he paid for the lease" (Tr. p. 207). And again: "He took his chances when he paid his rent" (Tr. pp. 211-12). This witness described W. H. Hammond as being "a man of means when he initiated the Bonner enterprise" (Tr. p. 206). The government witness McCulloch also testified to the *bona fides* of the lease of the Bonner plant to W. H. Hammond (Tr. pp. 178-9, 182).

Scattered everywhere throughout the record is conclusive evidence of the exclusive dominion, direction and control of this Bonner enterprise by W. H. Hammond.

For instance, the government witness, John Cunningham (Tr. p. 266) worked as a logger on a salary from 1886 to 1888. From 1891 to 1897 he "contracted", that is to say, he would enter into a contract with W. H. Hammond to cut over certain territory and bank logs on the river for so much money. During the years he worked in the Blackfoot country he was paid from three dollars to four dollars a thousand feet for this service, that is for taking the log from the stump and banking it on the river. During the entire time he was under the direction and management of W. H. Hammond (Tr. p. 270). The same is true of government witness, McNamara, also a logger (Tr. pp. 278-80) who also testifies to the strictness of W. H. Hammond's directions to cut within the lines blazed out for them (Tr. p. 280). To the same effect is the testimony of the Government witness, J. B. Seely (Tr. p. 183), who worked off and on as a logger from 1885 until 1889. He says (Tr. p. 187) that "A. B. Hammond did not at any time have any connection with the logging operations that were being conducted on the Blackfoot while I was there". The Government witness, Mitchell (Tr. p. 103) never saw A. B. Hammond on any of the lands the company was cutting in the Blackfoot country. Pat Hayes (Tr. p. 499), now a successful farmer and member of the Board of Trustees of the Missoula County High School, worked as a logger for W. H. Hammond, between 1886 and 1888 (Tr. p. 502). When Hayes was working up the Blackfoot A. B. Hammond was never around there. "He had nothing to do with it. It was all Henry Hammond. All I knew of the

operations in the Blackfoot was Henry Hammond. He was the head push of them all. Directed all operations and cutting up there'' (Tr. p. 503).

William Boyd, now a prosperous farmer, testified to the same effect. He commenced working for W. H. Hammond in 1888 and worked for him nine or ten winters. He says: ''I never did any business with A. B. Hammond at all; never asked me any questions at all'' (Tr. p. 52). To the same effect is the testimony of Malloch who was employed at the Bonner plant from 1888 to 1893 (Tr. pp. 520, 522).

In general, as to the alleged trespasses on the Blackfoot which involved some seven claims, there was only one, ''the Kelly Claim'' comprising the Northwest quarter of Section 18-13-14, as to which there was any conflict in the evidence concerning whether cutting had been done before or after the inception of the settlers' title. Any impartial tribunal must have reached the conclusion that the timber was cut off that claim subsequent to the inception of title in Kelly, August 24, 1894 (Tr. p. 744). The Government claimed 1,707,420 feet had been taken from this claim.

As against the positive testimony of three or four witnesses directly connected with the purchasing, cruising and cutting of the claim subsequent to 1895, there was, however, one witness who maintained that the claim had been cut in 1891 and this in spite of the fact that the claim was taken up subsequently as ''Timber and

Stone'' entry. A strange idea to take up as a timber claim what had already been denuded of timber. As to the Edgar Claim, the so-called Boyd trespass and the trespass under the supposed sanction of the Timber Permit, which have already been adverted to (supra) different considerations are applicable, but of the rest of the claims involved they either were not cut until long after the Anaconda Copper Mining Company purchased the Big Blackfoot Milling Company, or else were cut by W. H. Hammond or Big Blackfoot Milling Company, as the case may be, long after the Government had parted with title. Had defendant requested of the Court a series of instructions that as to each of these claims there was no evidence to show a taking of the timber therefrom at a time prior to the divesting of the Government's title and hence that as to each of such claims respectively the jury must find for the defendant, we would be in better shape to review piecemeal the insufficiency of the evidence as to each claim. This unfortunately was not done and we can only advert to the subject now in this general way as bearing upon defendant's alleged participation in these imaginary conversions. It is, of course, impossible for defendant to be liable for a conversion that never was committed. Nevertheless, we do not think it necessary to burden the Court with a review of the evidence as to these several respective claims; suffice it to say that on the Blackfoot, with the exceptions noted, the Court need not concern itself with the defendant's relation to the alleged conversions, for the conversions have not been proved.

(D) *The Missoula Mercantile Company—Defendant's Relation Thereto and Its Relation to G. W. Fenwick, W. H. Hammond, Blackfoot Milling & Manufacturing Company and Big Blackfoot Milling Company.*

As we have seen, Missoula Mercantile Company was organized in August, 1885, to take over the merchandise business of Eddy-Hammond & Co. There is a compilation showing the personnel of the stockholders of this company as it existed from time to time from its incorporation until the year 1898 (Tr. pp. 295-6) and the Minute Book of this concern from the time of its incorporation until September 8, 1894; is contained in Transcript pages 297 to 370. These documents were put in evidence by plaintiff. For what purpose we know not, for they afford convincing proof that Missoula Mercantile Company was by no means just another name for the defendant, A. B. Hammond. The fact appears conclusively that he held but a fraction of the shares of stock; that there was a regular corporate organization and that he was but one of its guiding spirits. If there be anything in all this which furnishes any comfort to the plaintiff in this case it will have to be pointed out to us. It is worthy of note that G. W. Fenwick, W. H. Hammond, Montana Improvement Company and Blackfoot Milling & Manufacturing Company were not stockholders of Missoula Mercantile Company. Big Blackfoot Milling Company was not a stockholder in Missoula Mercantile Company, save that in February, 1892, and thereafter it appears to have owned twenty-two shares of second preferred

stock of Missoula Mercantile Company. As was explained (Tr. p. 664) this came through a bad debt due to W. H. Hammond from one Ross who owned these shares in Missoula Mercantile Company for lumber purchased by Ross from Hammond. When Big Blackfoot Milling Company was organized and W. H. Hammond adjusted the transactions that had arisen while he operated the mill as lessee of Blackfoot Milling & Manufacturing Company these shares were turned over to Big Blackfoot Milling Company by W. H. Hammond—the former paying the latter therefor. To the same effect is the testimony of W. H. Hammond.

It elsewhere appears that Missoula Mercantile Company did not own any shares of stock in Blackfoot Milling & Manufacturing Company or Big Blackfoot Milling Company (Tr. p. 293).

It further appears from the record that Missoula Mercantile Company is today a subsisting and active corporation (see deposition of C. H. McLeod, at present president of said corporation, Tr. p. 285).

From an examination of the list of stockholders of Missoula Mercantile Company it appears that at the time of the incorporation of Missoula Mercantile Company defendant, A. B. Hammond, owned a third of that company. His interest fluctuated from time to time during the period involved in the complaint, but at no time did he control the company. As the owner of an equal share, namely, a one-third in the partnership of Eddy-Hammond & Co., he acquired a one-third of Missoula Mercantile Company. The transaction is open

and above board and is set out in full in the Minutes of Missoula Mercantile Company.

The stockholders of Blackfoot Milling & Manufacturing Company and Big Blackfoot Milling Company are named at pages 662-3 of the testimony. Defendant had about 20% of the stock in each of these companies, and it will be observed that there were many stockholders in the Missoula Mercantile Company who were not stockholders in these other companies. For the names of stockholders in the two Blackfoot Companies see testimony W. H. Hammond (Tr. p. 484) and G. W. Fenwick (Tr. 573).

An examination of the divergent personnel of the stockholders in the two Blackfoot Companies and the Missoula Mercantile Company furnishes conclusive evidence that each of these companies must in truth have been a separate corporation, run for its own profit and not for the profit of each other—much less of the defendant, A. B. Hammond, who was but a minority stockholder in all of them.

Defendant describes just what part he took in the direction of the affairs of Missoula Mercantile Company (Tr. pp. 688-90). In 1885, 1886, 1887, defendant was actively engaged in building railroads in Montana and gave up most of his time to that business, all of which he describes in detail (Tr. p. 692). He lived in Oakland, California, from 1890 until 1892, with his family, visiting Montana from time to time (Tr. p. 691). In fact defendant testifies that since 1888 he has not been active in any business in Montana (Tr. p. 706), at which time he disposed of his residence there

and has not attended to details of business since that date in that state (Tr. p. 706).

(E) *Specific acts or circumstances seemingly relied upon by the Government as evidencing Defendant's direction or control of the persons or corporations committing the alleged conversion.*

1. The relationship by marriage and by blood of the defendant to many of the persons in the transactions disclosed by the evidence.

George Hammond, Fred A. Hammond (both deceased) and W. H. Hammond were the defendant's brothers. G. W. Fenwick was his brother-in-law. John Hammond —a scaler employed by W. H. Hammond on the Blackfoot was a "double first" cousin—that is to say, John Hammond's parents were respectively brother and sister of defendant's parents. The Court laid special emphasis on this feature of the case, instructing the jury that they "might consider the relationship, if any, by blood, marriage or otherwise, shown to exist between the defendant and those immediately employed or engaged in the mills and logging camps".

We would suggest that relationship, by marriage or blood, if it ever means much, is of small, if any, consequence here. Had defendant owned a larger share in these enterprises than he did there might be more reason for the inference insinuated by the Court. He would hardly be likely to "use" these relatives to do unlawful acts for which they might be subject to severe penalties where his interest in the indirect fruits of the wrong doing could, on no theory, exceed 20 or 25%.

To our way of thinking the fact that G. W. Fenwick, W. H. Hammond and Fred Hammond were thus closely related to defendant permits only of the legitimate inference that defendant never dreamed for an instant that these parties were doing anything that might be even in the twilight zone of illegality. Is not the testimony of the government witness, Hathaway (Tr. p. 240) more to the point?

> "I don't know of my own knowledge whether or not A. B. Hammond and Henry Hammond supervised or controlled the operations of the Bonita Mill when it was owned by George W. Fenwick. I believe that A. B. Hammond wanted to help his relatives and that certainly when Fenwick was there, whatever Fenwick would make, it would be a pleasure to him. That is my honest, candid conviction. Further I do not know * * * I think he wanted Fenwick to make something. It was always his way of doing business, to put his relatives in and give them positions where he could assist them in any way he could. I naturally suppose he did that to Fenwick in this case. I think really he helped Fenwick to acquire that mill. Fenwick can tell you about that better than I can".

It would certainly be a strange way of helping a relative to encourage him in a course of conduct which one knew to be unlawful and particularly when the offended party is so formidable, favored, persistent and immortal an antagonist as is the United States.

2. The extension of credit by Missoula Mercantile Company to the persons or corporations committing the alleged conversions.

We have quoted herein defendant's description of the way in which business was handled in western Montana

in the early days of Eddy-Hammond & Co., and which persisted throughout the period named in the complaint, when Missoula Mercantile Company had succeeded to the business of that co-partnership. So far as George W. Fenwick and W. H. Hammond's activities are concerned we have already seen that they had other sources of credit and financial assistance than Missoula Mercantile Company.

The witness, Keith (Tr. p. 420) who had charge of the office of Missoula Mercantile Company, describes the transactions between these men and Missoula Mercantile Company and how orders would be drawn by them on the company to pay wages of their employees. Other lumber companies were doing business the same way with Missoula Mercantile Company (Tr. pp. 421-22). It will be noted particularly that this form of accommodation was not confined to lumbermen. It extended to farmers, trappers, traders, contractors and other customers generally (Tr. pp. 641, et seq.). Some customers carried larger accounts than did G. W. Fenwick and others less—customers which it is not pretended had anything to do with either A. B. Hammond or Missoula Mercantile Company. An instance was cited where Missoula Mercantile Company carried a man to the extent of thirty or forty thousand dollars, and in this connection the ~~plaintiff~~ witness stated that he thought it was true of many of the enterprises of those days that they could not have been carried on without the extension of credit by Missoula Mercantile Company (Tr. p. 424). Witness could not say that, however, as to the case of George W. Fenwick owing to the ar-

rangement that Fenwick had with Marcus Daly (Tr. p. 425). The limited banking facilities at that time of Missoula are set forth at page 427 and so far as this question of extension of credit by Missoula Mercantile Company is concerned it can best be summarized in the language of the witness (Tr. p. 428):

> "It endeavored to get hold of the accounts of these mill men and have them buy their supplies at the Missoula Mercantile Company and have them give their orders on it, and the Missoula Mercantile Company carried as many accounts as it could secure. It was the aim and object of Missoula Mercantile Company, during that time, to make itself the banker as well as the merchant for these little companies in the interest of its business, and I think it is quite true that many of them could not have run if they had not done it".

In general the testimony of C. H. McLeod is to the same effect; also that of Hathaway.

No reasonable man will question the fact that this method of doing business assisted in the development of the wilderness and the upbuilding of a pioneer country.

3. The lumber office in Missoula.

Plaintiff seemed to lay great stress on the fact that some of the mills maintained a lumber office in Missoula in close proximity to the office of Missoula Mercantile Company, but there is no sinister significance in this fact. As we have seen, when Mr. Bonner came to reside in Missoula and it was decided to liquidate Montana Improvement Company its office was moved from Deer Lodge to Missoula. The Government witness, Hathaway, testified (Tr. p. 215) that the office of Mon-

tana Improvement Company was located in a portion of what is now the office of Missoula Mercantile Company. Winstanley, now dead, was in charge of the books. The office had a separate stair-way and entrance. Montana Improvement Company while it ceased to do any new business had on hand a lot of old lumber which it took many years to sell (Tr. p. 228). Hathaway thinks his services as salesman and general manager of Montana Improvement Company ended in 1887, when he was employed in connection with building the Bitter Root Railroad and had a contract in connection with it (Tr. p. 240).

On this subject Fenwick testified (Tr. p. 556) that the office was upstairs over the office of Missoula Mercantile Company, a separate and distinct office for the lumber interests. His mill was located where there was no postoffice, no safe, no place to keep any records and he could not send his invoices out. He arranged with Winstanley to do the necessary clerical work in connection with the books. He reported his shipments to Winstanley and Winstanley would make the proper entry and proper charge and send the invoice to the party receiving the lumber, Anaconda Mining Company. Fenwick paid Winstanley for his services.

Again (Tr. pp. 592-3) he testifies the checks came to him at his address in Missoula, parties receiving credit for the checks before anything else was done with them. They were then turned over to the Missoula Mercantile Company in payment of his bills and placed to his credit. The details of his business with Mr. Daly were just the same as with other people.

Mitchell (Tr. pp. 94-6; 101-2) who for a while was at Bonita and for a while was assistant to Winstanley in Missoula gave evidence in corroboration of the foregoing. He testified that each mill had a separate set of books.

W. H. Hammond's relation to the lumber office in Missoula has already been considered under the topic of the Bonner Mill.

4. Defendant's participation in sending East to bring out laborers and in notifying laborers at what mills they would find work.

Government witness, Hathaway, made two trips East to Minnesota to bring out laborers. He thinks these trips were made in 1886 and 1887 and as to the first trip he got his instructions from defendant. The first batch of men went to work at a mill owned by Haycock (in which it is not pretended that defendant, or any of the companies mentioned, had any interest) where there had been a strike. Afterwards some of these men went to the Bonner or Bonita Mill (Tr. pp. 239-40). The bringing in of these laborers was necessary for the development of the country. Hathaway brought out pretty nearly three hundred of them. Lots of these men found employment in other places besides the Bonita and Bonner mills. Some found employment in the store, but the main body of the men brought out by Hathaway were lumbermen, lumberjacks (Tr. p. 242).

Defendant testifies (Tr. p. 673) that he remembers Hathaway going East. Defendant wanted lumbermen in

the Bitter Root Valley. W. H. Hammond was short of men, so was Fenwick, Greenough & Haycock, and the expense of sending Hathaway there was borne pro rata by the parties who got the men. Fenwick's testimony is to the same effect (Tr. p. 567) and so we find numerous instances brought out by plaintiff of so-called employment by defendant and we suppose these must be reviewed and the facts presented in their proper light.

Thus witness Van Keuren (Tr. p. 149) testified that in the fall of 1885 Hathaway ran across him in Idaho and asked him to go to work for the company. He came to Missoula and was introduced to defendant, who told him to go to Wallace and mentioned what the wages were that were being paid, giving him a letter to Henry Hammond, who the witness testified seemed to be "the push" up there. On going there he found they were full handed and Henry Hammond sent him to Bonita, where he got work.

In reference to this incident defendant testifies (Tr. p. 671) that he did not remember, but that it was quite possible he had sent Van Keuren to Wallace as Van Keuren testified, for whenever Henry Hammond wanted men he would telephone down and the defendant, or someone else, would attend to it.

Here it is well to explain in the language of defendant one of the many functions of the general country store in those early days:

> "Concerning what has been said in this case about the employment of men and the sending of men to different places for employment, a good many of the mills were situated at places where

there were no postoffices and at some of them there were no stations. When they wanted men they would send down to Missoula, send word, and we would send them up. That applied to farmers and stockmen, as well as lumbermen. A farmer came in from the country who had a ranch fifteen or twenty miles away, and he wanted a teamster, or a man who could run a threshing machine or a mowing machine, or a self-binder, or a man who could milk cows, and he was very apt to leave word with us if such a man came to Missoula that wanted such a job to send him up to him. The Eddy-Hammond & Company and the Missoula Mercantile Company did a lot of that business. That applies also to graders, and it applied to my work in the building of the Bitter Root road—my sub-contractors as well, and I furnished them with men and I sent to Utah and brought men out from that country for graders. We had little mills on the Bitter Root road and we had to have lumbermen to run them and we combined with other people who had mills and sent East and elsewhere to get lumbermen. When those men came to the country they came to Missoula, and if they were connected with the people that we sent to bring them there, why, we found out and we knew where we wanted men and we told them where to go."

According to the same witness defendant was guilty of selling him two horses. What the witness says on this subject and the defendant's comments thereon are set forth in the Transcript, pages 673-675.

Government witness, John Cunningham, was one of the men hired by Hathaway in Minneapolis in 1886. When he came to Missoula he went to the store of Missoula Mercantile Company and Jack Keith was there. He told him to see A. B. Hammond and A. B. Hammond told Cunningham and those with him to go up the

Blackfoot River and take a team he wanted to send up. When he got up to the camp on the Blackfoot River George Hammond put him to work (Tr. p. 275).

Defendant's comment on this incident, if deemed of interest by the Court, will be found in Transcript pages 675-6.

The witness, William Harley, testified that A. B. Hammond recommended him to Fenwick as a logger. Just what his testimony is in this behalf and the defendant's comments in relation thereto will be found at Transcript page 676.

The witness, Milton Hammond (Tr. pp. 140, 145-7) had a somewhat similar experience in reference to employment and bringing others out West. He was a remote cousin of the defendant and had corresponded with defendant about coming West. Milton Hammond's testimony and the defendant's comments in relation thereto will be found at Transcript pages 677-679. More significant possibly is the testimony of this witness that all the time he was on the Blackfoot he never saw A. B. Hammond there. He saw him at the Bonner Mill when A. B. Hammond was there on a kind of picnic or excursion. He never had any conversation in the Missoula Mercantile Company's store with defendant about the cutting of lumber.

The witness, William Greene, testified (Tr. p. 80) that he was employed to work in the Blackfoot country. He testified (Tr. pp. 83-84) that A. B. Hammond on the sidewalk in Missoula in response to the witness' question whether any more men were wanted in the

woods said that there were. A. B. Hammond took the witness' name down and he was told to go to Headquarters Camp on the Blackfoot River and George Hammond directed him to go to work. A. B. Hammond merely told him men were needed.

5. Miscellaneous acts of defendant which it is claimed indicate his connection with the alleged conversions.

The witness, R. K. McLaughlin (Tr. p. 86), employed as a logger on the Blackfoot in 1888-89, testified (Tr. p. 88) that practically all his business was with Henry Hammond and George Hammond. He saw A. B. Hammond once on the Blackfoot (Tr. p. 89). He testified that once in a while he had some talk with A. B. Hammond (Tr. p. 87), but A. B. Hammond never told him to go into the woods or where to log or haul (Tr. p. 89). He further testified that he brought to Missoula for sale some horses at the direction of George Hammond, which had been used in logging on the Blackfoot and that he had a conversation with A. B. Hammond in Missoula concerning same; that A. B. Hammond set the price on the horses (Tr. p. 92), but that he did not know whether A. B. Hammond was acting for himself individually, the company or W. H. Hammond. If the details of this horse transaction be of interest to the Court, McLaughlin's story will be found on pages 88-92 and the defendant's comments thereon at Transcript pages 680-81.

The Government witness, Felix Cyr (Tr. p. 109) lived in the vicinity of Bonita off and on since the year 1885. This witness testified that he saw A. B.

Hammond during the time the Bonita Mill was running in and about the mill and that on one occasion he received instructions from defendant described by the witness (Tr. p. 110) as follows:

> "One time I was working there that first fall and my dad was working there with a team. My dad was supposed to be driving a team, but I was driving; I was fifteen years old then. A. B. Hammond came up. He said to me, where is your dad? I said he is over home. He said, you better go back and tell him to drive his own team, you are too small."

The witness further testified (Tr. p. 111) that defendant did not give him instructions that there was a boss there taking charge of the camp and that defendant used to go there once a month, or off and on.

The witness further testified (Tr. p. 112) as follows:

> "As to my understanding that Mr. A. B. Hammond was the head man—I told you the way it is. Suppose we worked for a business and they say it is Hammond's sawmill. When we got pay we went down to Hammond's office to get pay; I always thought it was Hammond's mill. That is all I know about it."

The witness was given a time check at Bonita which he cashed at the Missoula Mercantile Company's store through Jack Keith, who was cashier in those days (Tr. p. 112).

Concerning this incident defendant testified (Tr. pp. 666-7) that he knew a boy of this name and he knew Dumas, his father, and he knew the latter down East. He does not recall the incident mentioned by the wit-

ness, Cyr, but states it may have occurred; that he may have made use of such an expression as a pleasantry; he testified that he never gave any orders to any persons about any transactions in connection with the logging operations at the Bonita Mill.

The Government witness, William A. Cook, was at great pains to explain a fuss which the defendant had with one George Rich (Tr. pp. 131-2). We do not think it necessary to weary the Court with the details of this fuss. Cook's testimony in reference thereto is set out at Transcript pages 131 et seq. and the defendant's comments thereon follow in at pages 669, 70 and 71.

In a word it may be said that defendant representing Eddy-Hammond & Company, or E. L. Bonner & Company, had some difficulty with Rich in 1884 about some piles which he was to have furnished in connection with the Northern Pacific Railroad contract. He did not have any controversy with him at any time about any logs for the Bonita Mill and the dispute in question occurred a year before the Bonita Mill existed, hence the incident narrated by Cook is of no significance as showing any direction or control by defendant over the logging operations of Fred Hammond, or G. W. Fenwick, in connection with the Bonita plant.

Government witness, Pat Joyce, who was a logger on the Blackfoot in 1886 working for George Hammond at Fish Creek Camp, testified (Tr. p. 159) that he saw defendant on the log drive there; that defendant came to where they were driving:

> "I heard a conversation between A. B. Hammond and George Hammond at that time—made it public to the men. At that time there was quite a few quitting and discharged, and they were short handed there, and A. B. Hammond came up there and he finally told George Hammond that the next man that would go down he, that is George Hammond, would go down too."

He testified that defendant was not very long in and about Fish Creek Camp at the time of this conversation with George Hammond and that that was the only occasion on which he saw defendant up the Blackfoot.

Defendant knew of Pat Joyce and denied ever saying such a thing to George Hammond, who was his older brother, and that at the time he did attend the drive on the Blackfoot he had no interest of any kind in any of the operations that were being conducted on the Blackfoot; that George L. Hammond was neither directly or indirectly in the employ of defendant in any capacity (Tr. pp. 665-6).

If on this appeal we are compelled to accept the word of Pat Joyce as against that of defendant, what then is the legal significance of the conversation reported by Pat Joyce? It has been freely conceded that defendant as an employee of the country store kept in touch with the matter of the supply of labor to the industries centering around Missoula. The remark is susceptible of the construction, indeed, Pat Joyce admits, that there was a scarcity of labor and it may well have been that if any more laborers left the Blackfoot there would be none coming up from Missoula to take their places and that George Hammond would have to come down

and take this responsibility on himself—the conversation does not say where—presumably to Missoula and the object in his coming down might well be based on several different reasons. In the first place, if the work had to be abandoned for lack of laborers there would be no occasion for George Hammond remaining there as foreman; in the second place, he might have to come down to scour the country for those laborers which were not apparently reporting for jobs at the office of the Missoula Mercantile Company, and in the third place, it might have been merely a suggestion that he, George Hammond, go down to W. H. Hammond at Bonner and explain to him what was the trouble. It is certainly pushing the import of the conversation to a limit which it does not warrant to find in that conversation evidence that defendant was exercising such authority as amounted to the control and direction of the whole Blackfoot operation.

Michael J. Haley (Tr. p. 163) had been a special agent of the General Land Office in Montana from 1884 to 1892. Incidentally he made two examinations two years apart around 1886 and 1888 of the Edgar Claim, estimating the amount of timber that had been taken therefrom, which will be referred to later. He testified (Tr. pp. 167-8) that he had a conversation with defendant about the general cutting up and down the Blackfoot River (doesn't know whether the cutting on the Edgar Claim was specifically mentioned) and defendant took the position that they were cutting within legal bounds. Haley talked with defendant about it two or three times, perhaps more.

"Q. Did Mr. Hammond or did he not assume to be in control or have anything to do with that cutting that was then going on on the Blackfoot River?

A. He let me know that he was the head of the whole thing.

Cross-Examination.

Q. What did Mr. Hammond say to you?

A. I do not remember what he said, but the impression he gave me was that he was the—that it belonged to the Company. That is the impression I have now and that was told me twenty-five years ago."

Summarized, this simply means that special agent Haley got the impression from defendant that "the company" (whatever company it may have been—the date is not given as to when these conversations took place) owned the land on which Haley contended some unlawful cutting was taking place or had taken place.

6. The Helena Lumber Yard and defendant's relation thereto and the source from which its lumber came.

As we have seen, the lumber yard at Helena owned by Montana Improvement Company was in the fall of 1885 sold to V. H. Coombes. Plaintiff apparently takes the position that this was not a bona fide transfer and that defendant, interested in said yard as a stockholder of Montana Improvement Company, continued to be interested therein, directing and controlling it.

The Government called as a witness Charles T. McCullach (Tr. p. 170), who was employed by Helena Lumber Company in 1888 and which had succeeded W. H. Coombes in the ownership of said yard at Helena.

McCullach was employed as bookkeeper. He was there just one season. While he was working there he saw the defendant there and apparently he was looking over the business in a general way. Defendant had access to the books, if there was anything came up that he wanted to know (Tr. pp. 171-2). Witness did not know whether defendant owned any stock in the company (Tr. p. 173). V. H. Coombes was president and a man called Cameron secretary The manager of the planing mill connected with the yard, named Gunter, claimed that he owned $2500.00 worth of stock in the company; so did another man named Hoskins. So far as the witness knew neither Missoula Mercantile Company, nor Eddy-Hammond & Co., nor Montana Improvement Company were stockholders. He stated W. H. Hammond was connected with the company—the same W. H. Hammond who was at the Bonner Mill. Witness did not know of any shipments being received from the Bonita Mill (Tr. p. 174) and their instructions were to use everything they could from the Bonner Mill. He testified that defendant was not an officer of the corporation, but was recognized as the general financier of the company. He states defendant did not come to Helena very often and witness could not state that he saw him there more than five or six times. The company handled other commodities besides lumber, namely, coal and lime and possibly building paper (Tr. pp. 175-6). The only conversation witness could recollect with defendant was concerning matters that had taken place before the witness was there employed and he recalled particularly that defendant inquired concerning the condition of the

security as to small stockholders in Helena Lumber Company who had bought their stock on credit and witness could not give him the desired information, as it was a transaction occurring before his time (Tr. p. 176).

Defendant testified (Tr. p. 682) that he was connected with the ownership of quite a large amount of land around the Helena depot and in the section where the Helena lumber yard was situated; that Helena Lumber Company took the contract to erect small buildings thereon and defendant used to go to Helena on this and business connected with railroad operations that he was carrying on. When he did visit Helena he naturally would look over this real estate and visit the Helena Lumber Company's office. When Montana Improvement Company sold to Coombes it was a sale largely on credit and when Helena Lumber Company was formed it assumed the indebtedness of Coombes to Montana Improvement Company. Defendant states he might have made the inquiry testified to by McCullach as to whether the stockholders who had subscribed for stock in Helena Lumber Company had paid in their subscriptions, though he has no recollection thereof. However, Montana Improvement Company was in liquidation at the time and dependent upon the sale of its properties that it had made for part cash and part credit to pay its obligations, and as a stockholder in Montana Improvement Company defendant was interested in knowing how its creditors were getting along. He denies having any interest of any kind or character in the Helena Lumber Yard. Witness further testified

that he did not have to do directly with the collecting of the assets of Montana Improvement Company, but he was interested in the collecting of its assets and seeing the accounts paid (Tr. p. 683).

There is nothing in the testimony of Hathaway contradictory to the foregoing. McCullach (Tr. p. 172) states that Hathaway was present at the Helena Lumber Yards during part of the time he, McCullach, was working there and that McCullach always recognized him as an auditor, but he acted also in the capacity of a salesman, a general adviser.

7. The sale of Big Blackfoot Milling Company to Marcus Daly, or the Anaconda Copper Mining Company.

Plaintiff endeavored to establish that defendant exercised such control in consummating this sale as to indicate, at least, his dominance generally in the affairs of Big Blackfoot Milling Company and there may be other inferences supposedly adverse to defendant claimed by plaintiff as legitimately arising from this situation, but we do not know what they are. Anyhow these are the facts:

In 1898 (the conversions in this case are not claimed in the complaint to have been committed subsequent to January 1, 1895, and the Government's testimony does not show the severance of any timber subsequent to 1891) Marcus Daly of the Anaconda Copper Mining Company purchased all the shares of stock of Big Blackfoot Milling Company. The witness, G. W. Fenwick, names the stockholders and the amounts realized by some of them from this sale

(Tr. p. 573). He further testifies (Tr. p. 579) that the early negotiations for the sale of the property were conducted between W. H. Hammond and Thomas Hathaway on the one hand and a representative of Marcus Daly on the other hand, and he thinks that the final closing of the negotiations was accomplished by the parties mentioned, together with the defendant. Defendant was made a trustee for winding up the business, but whether or not he was made a trustee for the purposes of the sale Fenwick does not recollect. He thinks the stock was put in escrow in a bank for Daly. The sale netted about $1,100,000 (Tr. p. 580).

W. H. Hammond, who was president of Big Blackfoot Milling Company from its organization until the time of its sale to Daly was of the opinion (Tr. pp. 476-7) that defendant was appointed sole trustee for all of the stock of Big Blackfoot Milling Company to negotiate a transfer of his interest and the interest of his associates to Daly; that defendant did not alone conduct these negotiations. The witness and Hathaway had something to say about it. Witness further testifies (Tr. p. 484) that he received something over two hundred and fifty thousand dollars for his shares and that defendant had no interest in, nor did he receive any part or portion of this money.

Defendant testified (Tr. p. 693) that he does not think he was appointed trustee by the stockholders or that all of the stock was placed in his name to consummate the sale to Daly. His recollection accords with Fenwick's that the stock was deposited in escrow in the bank, but he does not remember positively. He does remember

that it was not transferred to him and that he deposited his stock like any other stockholder in escrow and Daly paid for the stock and took it over and the purchase price was not paid over to defendant. Defendant admits (Tr. p. 694) that as a stockholder—the evidence showing that he held about 20% of the stock, roughly the same amount as held by his brother, W. H. Hammond —he would have been drawn into these negotiations anyhow; that they would not have sold without the consent of all the stockholders, but in addition to that, defendant individually owned some thirty-five hundred or four thousand acres of timber land on Nine Mile Prairie, about thirty miles west of the Blackfoot River and Marcus Daly did not want to buy out Big Blackfoot Milling Company unless he could get these timber lands to use in conjunction with a lumber mill which Daly or the Anaconda Company had down in that locality. Defendant does not recall how much he received out of the sale of his Big Blackfoot Milling Company stock to Mr. Daly, but he received several hundred thousand dollars for his holdings on Nine Mile Prairie.

8. Tax Assessments.

Over the objection of defendant, which will be later considered, the tax assessment of Missoula Mercantile Company for several years was admitted in evidence. Assuming for present purposes that these tax assessments were properly admissible, evidence which neutralizes absolutely the inferences that might flow therefrom was introduced and must here be considered. In short, it appears that for purposes of convenience in handling

the payment of taxes it was customary to assess to Missoula Mercantile Company a number of properties which admittedly it did not own, or have any interest in. At transcript pages 404-408 will be found excerpts from the tax assessment of Missoula Mercantile Company for the years 1890 to 1895, each inclusive. These assessment rolls showed that Bonner Mill was assessed to Missoula Mercantile Company throughout these years and that in 1890, 6,750,000 feet of lumber and 4,000,000 feet of logs were also assessed to Missoula Mercantile Company.

Defendant testified (Tr. pp. 683-5) that he had never authorized or directed nor was he ever present at any meeting of the board of directors of Missoula Mercantile Company which authorized or directed that company to return to the assessor any property; that he never authorized any person to make return of the Blackfoot Milling & Manufacturing Company's property or the Big Blackfoot Milling Company's property to the assessor either in the name of Missoula Mercantile Company, or any other name.

In the assessment rolls there was specific property described and assessed to Missoula Mercantile Company which defendant testified did not belong to Missoula Mercantile Company, such as the residence of Col. Eddy and E. L. Bonner and several lumber mills in the Bitter Root Valley; also the Florence Hotel and Eddy Block, which belonged to Missoula Real Estate Association. Defendant had no personal knowledge of how it was that these different properties not belonging

to the Missoula Mercantile Company happened to be assessed to it.

In connection with the testimony of W. H. Hammond defendant offered in evidence (Tr. pp. 487 to 490) assessment book setting forth the assessment of W. H. Hammond for the years 1886, 1887 and 1888, which showed the assessment to W. H. Hammond of the Bonner plant and equipment for those years. The witness, W. H. Hammond, also testified in reference to certain of the assessment rolls of the Missoula Mercantile Company offered in evidence by plaintiff, that the Missoula Mercantile Company did not own or have any interest nor did defendant, in two houses, one his residence which in the years 1894 and 1895 had been assessed to Missoula Mercantile Company. The witness did not know how it came about that this property of his was assessed to Missoula Mercantile Company. He told Gust Moser, who was secretary of Missoula Mercantile Company, and Big Blackfoot Milling Company, to take care of his, the witness' taxes and the witness supposed that Moser for his own convenience listed the property that way. Further explanation will be found at transcript, page 490.

In connection with the testimony of G. W. Fenwick, defendant also offered in evidence the assessment rolls for the taxes on the Bonita operations which were assessed to Fenwick for the years 1886 to 1891 inclusive. These will be found at transcript, pages 600-601.

C. H. McLeod, the present president of Missoula Mercantile Company, called as a witness on behalf of

defendant, testified by deposition (Tr. pp. 285, 290) that Missoula Mercantile Company never had any interest in the Bonner Mill, nor did he remember it ever at any time owning any saw mill, or having any interest in any saw mill in the State of Montana; he did not know whether Missoula Mercantile Company ever paid taxes on the Bonner Mill at any time between the years 1885 to 1892 and he did not think Missoula Mercantile Company ever paid any taxes on any other saw mills during the years mentioned. He stated there were different persons in charge of tax matters relating to Missoula Mercantile Company from 1885 to 1892. First of all Jack Keith and then Gust Moser, who became secretary of the company to look after the taxes from 1888 or 1889 to 1895. The witness "supposes" that the assessments were referred to the directors before the taxes were paid but that "they had charge of the assessments and looked after the business, putting in our property, and it was approved by the board of directors, I suppose those things generally are. As a general rule, the assessment list would be finally approved by the board of directors before it was handed to the county assessor."

(9) The disposition of the lumber manufactured at Bonner and Bonita.

Plaintiff apparently endeavored to establish an interrelationship between the several lumber operations and defendant evidenced by the disposition of the manufactured product. We do not quite understand wherein the relevancy of this showing would exist, but we shall

proceed to state what was the testimony in relation thereto, particularly as it will cover the point next to be made by us, namely, that the lumber claimed to have been converted was all devoted to mining, manufacturing, agricultural and domestic uses within the meaning of the Acts of March 3, 1891, which we contend gave immunity to all persons concerned with the cutting of the timber involved in this action.

As to the Bonita operation there is no evidence that any lumber was shipped therefrom prior to G. W. Fenwick becoming the owner of this mill. Defendant testified that Montana Improvement Company never operated this mill; that it merely sold the mill, set up, to Fred Hammond (Tr. p. 654). Hathaway testified (Tr. p. 227) that Montana Improvement Company only ran the mill for a very short time—not more than a month or two—and that the lumber cut by it went into the construction of the mill itself, bunk houses and different buildings. Fenwick testified (Tr. p. 568) that while he was operating the Bonita Mill he did not sell any lumber to the Missoula Mercantile Company and that defendant did not, nor did any firm or corporation with which he was connected, purchase any lumber from him (Fenwick). He further testified (Tr. p. 571) that he was a resident of Montana from 1883, when he came there from Canada, until 1900; that he is now a citizen of the United States; that a large part of the timber that he cut at Bonita was utilized in Butte and Anaconda for mining purposes and the remainder of the timber that he cut was used for mining, agricultural and domestic purposes within the State of Montana.

Mitchell, who was at Bonita in 1886, speaking of the shipments of lumber made from there testified (Tr. p. 100) that the lumber that had been cut at that time was not shipped out of the State, but mostly all to the Anaconda Mining Company—either to Butte or to Anaconda. Hathaway at first was under the impression that the product of the Bonita Mill was sold to or handled through Montana Improvement Company (Tr. pp. 201-2); but he corrected this statement (Tr. pp. 209, 230) and testified that the lumber was billed direct to the party who gave the order. Finally (Tr. pp. 242-3) he testified positively that Fred Hammond could not have sold any of the lumber manufactured by him to the Montana Improvement Company and that this is also true of the Bonita product when Fenwick owned and operated that plant. He also testified (Tr. p. 240):

> "I never sold any lumber for the Missoula Mercantile Company. The Missoula Mercantile Company to my knowledge never owned—they used to sometimes considerably back—mills, for the sake of trade."

As to the Bonner product W. H. Hammond testified (Tr. p. 485) that the lumber he cut at this plant was bought by Anaconda Mining Company and that prior to the incorporation of Big Blackfoot Milling Company all of the lumber that was cut by him, or under his direction, was used in the mines and smelters at Butte. The purposes for which the lumber manufactured at Bonner was used in the mines as timber, planking and lagging and building material for building smelters, etc., fences for agricultural use and flooring

of all kinds and material that was used for the construction of houses. Some lumber was sold to the railroad and used for ties and bridges and for all of these purposes the lumber so manufactured defendant used in the State of Montana.

We have already learned that part of the product of the Bonner Mill went to the Helena Lumber Yard, which was a retail yard. The lumber from Bonner, Mitchell testifies (Tr. pp. 104-6) went to the Anaconda Mining Company at Butte, Anaconda Smelting Company at Anaconda and the Great Northern Railway Company at Great Falls, Livingston, Billings, Phillipsburg, Granit and Helena; that all of these places are in the State of Montana.

Lumber also was sold from the Bonner Mill to the yard in Missoula, first known as the Rutherford yard, later owned by Dan Ross, and finally taken over by Big Blackfoot Milling Company (Mitchell, Tr. pp. 96-103-4). This yard ultimately resulting in the financial embarrassment of Dan Ross and the acquisition by Big Blackfoot Milling Company of a few shares of stock which Ross had owned in Missoula Mercantile Company has already been adverted to.

The evidence shows W. H. Hammond to have been a bona fide resident of the State of Montana during the period involved in the complaint.

We submit that the foregoing evidence was not sufficient to permit the case to go to the jury and that

the Court should have instructed the jury to find for defendant on the theory that there was not sufficient evidence offered to connect defendant with any of the conversions alleged to have been committed.

THE END OF PART ONE.

CHAS. S. WHEELER,
W. S. BURNETT,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

In the District Court of the United States
in and for the
Northern District of California
No. 15,130

United States of America,
Plaintiff,
vs.
A. B. Hammond,
Defendant.

Reported 226 Fed 8H

Frank Hall, Assistant Attorney General; Benjamin L. McKinley, United States Attorney, and Thomas H. Selvage, Assistant United States Attorney of San Francisco, California, for plaintiff.

Charles S. Wheeler and W. S. Burnett of San Francisco, California, for defendant.

Van Fleet, District Judge.

The government brought this action to recover the value of a large quantity of timber cut from the public lands and alleged to have been converted to the use of the defendant. The jury gave a verdict for the plaintiff and the defendant now asks for a new trial. There are several grounds assigned in the petition as involving error, but the only points upon which stress has been laid in the presentation of the motion are two, involving

the correctness of the charge of the Court upon the subject of the measure of damages. It appearing that all the timber in question had been manufactured and sold before suit the Court charged the jury as follows:

> "If under the principles I have stated you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatsoever condition it may have been at the time of its disposition or sale. If you find that the defendant or any of said corporations while cutting under his direction and control converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale. In other words, if you find that timber was so cut and removed from lands of plaintiff and that there was added thereto certain value by reason of the manufacture of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacture of said lumber and price for which it was sold in the market."

This feature of the charge gives rise to the first objection urged. It is contended that it is erroneous in that first, the measure of damages when the taking is innocent is not the difference between the expense incurred in manufacturing the lumber and the price for which it is sold, but is the stumpage value only. Second, that the instruction was inapplicable to the facts

of the case because there was no evidence to show the expense of manufacture of the lumber. In the first place I do not regard the exception reserved as sufficiently specific to point the Court's attention to either aspect of the objection now urged, and, if that view be correct, it cannot now be availed of to challenge the propriety of the instruction in the particulars complained of, even if otherwise well taken. The language of the exception is this:

> "Next, as to the measure of damages we except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree, and I think your Honor's instructions add to it another element."

It will be observed that the charge covers two alternative propositions. The first applicable to a wilful taking, the second should it be found that it was unintentional or innocent. As to the first, no question is now made as to its propriety, the objection being aimed at the second, ~~covering~~ governing an innocent trespass, but there is nothing in the language of the exception that would indicate to the Court whether it referred to the first rule stated or the second, and the Court, therefore, ~~cannot~~ could not know to which the objection was intended to apply.

In its terms it would apply to one as readily as the other, but, moreover, if it may be said that the exception sufficiently indicates its application to the rule governing an innocent taking, it is wholly lacking in any suggestion that it was aimed at either of the defects now urged. It contains no intimation as to what

improper element was claimed to be included; nor does it even remotely suggest that the charge was for any reason deemed inapplicable to the facts.

No question of procedure is better settled in these courts than that an exception to a charge in order to entitle one to have it entertained must be sufficiently distinct and specific to direct the attention of the Court to the particular vice or error complained of, that the Court may see whether the objection is well founded and have an opportunity before the jury retires to correct the mistake if one has been made. Thus in McDermott vs. Severe, 202 U. S. 600, 610, discussing an exception to the charge of the Court on the question of damages where as here the charge involved several distinct elements, it is said:

> "The Court's attention was not called to any particular in which this charge, which covers a number of elements of damages, was alleged to be wrong; only a general exception was taken to the charge as given in this respect. It has been too frequently held to require the extended citation of cases, that an exception of this general character will not cover specific objections which, in fairness to the Court, ought to have been called to its attention, in order that, if necessary, it could correct or modify them. A number of the rules of damages laid down in this charge were unquestionably correct; to which no objection has been or could be successfully made. In such cases it is the duty of the objecting party to point out specially the part of the instruction regarded as erroneous. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 86; 39 L. Ed. 624, 629; 15 Sup. Ct. Rep. 491. * * * It would be very unfair to the Trial Court to keep such an objection in abeyance, and urge it for the first time in an appellate tribunal."

And again in Mobile, etc., Co. v. Jurey, 111 U. S. 584, 596, where the charge embraced two several elements, and the exception failed to specify as to which it was intended to apply, it is said:

> "Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: First, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be 8 per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the Court the precise part of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the Court before the retirement of the jury to make up their verdict, as to enable the judge to correct any error, if there be any, in his instructions to them.' Jacobson v. State, 55 Ala. 151.
>
> 'When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the Court to the precise point of objection.' R. R. Co. v. Jones, 56 Ala. 507.
>
> So in Lincoln v. Claflin, 7 Wall. 132, this Court said: 'It is possible the Court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.' On these authorities we are of the opinion

> that the ground of error under consideration was not well saved by the bill of exceptions."

The same principles are stated by Judge Morrow speaking for the Court of Appeals in this circuit in Montana Mining Co. v. St. Louis M. & M. Co., 147 Fed. 897-909, and by Judge Gilbert in Butte, etc., Mining Co. v. Montana, etc., Mining Co., 121 Fed. 524-528; see also Springer etc. Co. v. Falk, 59 Fed. 707; Stewart v. Morris, 96 Fed. 703; Porter v. Buckley, 147 Fed. 140; Coney Island Co. v. Denman, 149 Fed. 687; Central, etc., R. Co. v. Mansfield, 169 Fed. 614; Beisecker v. Moore, 174 Fed. 368.

Within the principle of these cases it would seem to be clear that the exception here taken to the feature of the charge under consideration is not such as to entitle the defendant to urge the objections sought to be interposed, but if we may regard the exception as sufficient in substance to enable the Court to consider the objections urged upon their merits, I think it will be found that the charge in the respect involved is fully in harmony with approved principles applicable to cases of this character.

In Pine River Logging Co. v. U. S., 186 U. S. 279, 293, where the question as to the proper measure of damages in such cases is exhaustively considered, the Court, referring to the previous case of Woodenware v. U. S., 106 U. S. 432, as "decisive of the law in this connection", say as to what was there decided:

> "The question was whether the liability of the defendant should be measured by the value of the timber on the ground where it was cut, or at the

town where it was delivered. It was held that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Upon the other hand, if the trespass be wilfully committed, the trespasser can obtain no credit for the labor expended upon it, and is liable for its full value when seized; and if the defendant purchase it in its then condiiton, with no notice that it belonged to the United States, and with no intention to do wrong, he must respond by the same rule of damages as his vendor would, if he had been sued. 'This right' (of the recovery of the property), said the Court, 'at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.' ''

The principles there stated will be found reflected in their substantive effect in the language of the charge given, which though different in phraseology to conform with the facts of the case, states essentially the same rule. Counsel states that the charge is erroneous because in effect it directs the jury to deduct from the selling price of the lumber the cost of manufacture and bring in a verdict for the difference, thus giving the plaintiff the benefit of any profit upon the business

of manufacturing and selling the lumber, whereas it was only entitled, if the taking was other than wilful, to the value before manufacture. If the language will bear this construction, which is not conceded, there is a principle running through all the cases, sometimes implied rather than expressed, which the contention ignores, and that is, that one committing a trespass by converting another's property, although innocently, is not entitled to reap a profit on the transaction. If the purchaser in such a case is permitted to retain all that he has expended in enhancing the value of the converted property he is getting all the protection to which he is entitled. Thus in Winchester v. Craig, 33 Mich. 205, a leading case upon the subject, it is said:

> "The Court under one branch of the charge instructed the jury to allow the market value at Detroit or Toledo less the sum of money which the defendant expended in bringing it to market. This we think was as favorable as the defendant had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit on what they had done, but protected them to the extent of the advances they had made, and this we think was correct."

See also Trustees of Dartmouth College v. The National Paper Company, 132 U. S. (*This should be Fed.*) 92.

As to the point that the instruction was inapplicable to the facts of the case I deem it sufficiently answered by the record; the second objection urged against the

charge is based upon this language on the subject of interest:

> "In ~~taxing~~ fixing the amount ~~if~~ of any verdict you may find for plaintiff, you should include interest on the value of any lumber so converted from the ~~day~~ date of such conversion to the present time. * * * The rate of interest is the legal rate of 7%."

The ~~objection~~ exception reserved to this portion of the charge was in these words:

> "I also except to your Honor's instruction with regard to interest."

It is obvious I think that this exception is insufficient within the principles of the cases above stated and particularly Mobile, etc., v. Jurey, supra, the latter case being ~~peculiarly~~ precisely apposite in the nature of the question involved. As in ~~this~~ that case the charge here embraces two distinct propositions on the subject to which it relates. First, the right of the plaintiff to interest and second, the rate by which it is to be estimated. The criticism now made is, not that plaintiff was entitled to interest in no event, but that its allowance should, under the circumstances, have been left to the discretionary judgment of the jury. But manifestly the language of the exception is not of a nature to convey any such significance to the mind of the Court, nor indicate whether the objection was aimed at the direction to award interest or to the specification of the rate at which the jury should compute it. Had the Court's attention been arrested to the objection now urged it would have been a very easy matter to modify its language to avoid the criticism had it been deemed

correctly founded; but although the prayer of the bill was amended at the trial to include the demand for interest and plaintiff's requested instructions included one for its allowance, those of defendant were silent on the subject and the charge was framed upon the assumption by the Court that its allowance was a matter of right. Moreover, the specification of the rate of interest having been inadvertently omitted from the charge, was added by the Court at the suggestion of counsel for the government before the jury retired, and neither then nor thereafter in taking his exceptions did defendant suggest any objection to the direction on the subject other than the general exception above noted. Under the circumstances I think the assertion of the objection now made must be held as unavailing.

In view of this conclusion it would subserve no useful purpose to discuss definitely the question strongly mooted between counsel, whether the objection now urged if properly raised would be well taken. It may be suggested that while the question seems left in some doubt and difference in the Federal courts whether interest in the absence of statutory sanction is allowable as a matter of right, the rule of the charge is the generally prevailing one (Sedgwick's Elements of Damages, p. 137, 2nd Ed.; 1 Sedgwick on Damages, 631; Joyce on Damages, Vol. 2, p. 1261, par. 1105; Sutherland on Damages, Vol. 2, p. 969, par. 355) and is that prescribed by statute in this and most of the other states. These suggestions are made merely to illustrate that the question in controversy is a close one and the case, therefore, essentially one where the exception should have

been such as to specifically direct the attention of the Court to the precise objection intended to be raised.

As indicated, the other errors assigned have not been strongly urged and do not call for extended notice. As to the suspending, at the request of the jury, of the further reading of the evidence of the witness Hathaway, it clearly in my judgment involved no prejudicial error. The evidence was being read solely to refresh the memory of the jury, and when it reached a point where they announced that their desire was satisfied and they wished to hear no more, the object for which they had come into the Court was accomplished and the Court was justified in ordering the reading stopped. Presumptively the jury expressed this desire because they remembered the evidence of the witness in other respects. The case is unlike that of Hersey v. Tully, 8 Colo. App. 110, relied on by defendant. There the Court against the objection of defendant directed what evidence should be read to the jury. Here the evidence was read with the consent of both parties until the point where the jury announced themselves satisfied. Logically could the reading not have been stopped then it could not with any more propriety have stopped short of reading all the evidence taken. As suggested by the Court at the time, it was a question of the extent to which the jury felt ~~that~~ they were in need of having their minds refreshed, as they had heard the entire evidence from the witness stand.

As to the point made that the evidence was insufficient to justify the verdict, I am satisfied that a reading of the record will disclose that this is without

substantial merit. These are all the points made, and I find nothing in them to warrant the Court in granting a new trial.

The motion is accordingly denied.